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ONTARIO LABOUR RELATIONS BOARD REPORTS



April 1989



Ontario


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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1989] OLRB REP. APRIL

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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3220-88-R International Union of Operating Engineers, Local 793, Applicant v. B. Maskell Limited, Respondent

Certification - Construction Industry - Practice and Procedure - 4½ days between receipt of documents from the Registrar and the terminal date is sufficient time to respond to application - Application disposed of without hearing - Objections to certification from employer dismissed - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

DECISION OF THE BOARD; April 20, 1989

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act.

3. The respondent filed a reply, a list of employees, and specimen signatures for those employees within the time fixed therefore in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

4. In a letter which accompanied its filings, the respondent writes that:

The application was received on Friday, April 7th, which allowed me only 4-1/2 working days to seek legal advice [sic], research my position and submit my response, and I feel that this was totally inadequate preparation [sic] to meet the Terminal date of today. It furthermore did not allow my employees time to research their position since being approached on the job site by the union, nor to seek their own legal advice, especially concerning an objection to certification.

Please clarify one point for me. Did the union representative have the right to interrupt over [sic] work on the job site in order to conduct his recruitment program?

5. Under cover of letter dated April 5, 1989, the Registrar sent the respondent notice of this application together with the other requisite documents with respect thereto in accordance with the Board's Rules of Procedure. Section 91 of the Board's Rules of Procedure stipulates that, where the Registrar causes the respondent to an application for certification in the construction industry to be served by mail, the terminal date for the application shall be fixed not less than 4 and not more than 6 days after "the day immediately following the day on which the Registrar mails the notices". Because Saturdays are counted but Sundays are not for such purposes, April 13, 1989, which was the terminal date fixed for the application, was the latest date which could have been fixed therefor in accordance with the Board's Rules of Procedure. Also, it has been the Board's experience that 4-1/2 days is a sufficient period of time for an employer to assess its position and prepare its "response". Even though it is not generally permissible for an employer to make representations of the kind it appears the respondent has purported to make on behalf of its employees in an application for certification (see *Image Painters L.M. Inc.*, [1988] OLRB Rep. Aug. 807; *Federated Building Maintenance Company Limited*, [1979] OLRB Rep. Oct. 974), 4-1/2 days is generally also an adequate period of time for such employees to take whatever step they feel to be appropriate.

6. With respect to the question posed in the last paragraph of the respondent's letter, the Board does not advise parties. They can, if they wish, obtain such advice elsewhere and, if they find it appropriate to do so, make allegations of any improper or irregular conduct. Any such allegations must, of course, be particularized in accordance with the provisions of section 72 of the Board's Rules of Procedure.

7. In paragraph 14(3) of its reply, the respondent requested a hearing of the application by the Board. In support of its application it states:

- a) To the best of my knowledge, the application for certification is without foundation, and does not have the support of any of my employees.
- b) The bargaining unit proposed by the applicant is totally inappropriate, in that its composition consisting of operators of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repair and maintenance of same, does not have any similarity in interest to those engaged in surveying.

Also, the proposed bargaining unit contains employees of the respondent who exercise managerial functions, i.e. Party Chiefs.

In conclusion, in review [sic] of this, the respondent submits that the application should be denied.

8. The construction industry provisions of the Act generally, and specifically section 102(14), together with the Board's Rules of Procedure with respect to applications for certification in the construction industry, enable the Board to dispose of such applications in an expedited manner without an oral hearing. Section 97 of the Board's Rules of Procedure requires a party requesting hearing to set out, in writing, the material facts upon which it relies, the relief it seeks, and the submissions it proposes to make at the hearing in support of its request therefor. The Board will not hold a hearing where irrelevant reasons are given in support of the request for one, or where the employer questions whether its employees really wish to be represented by the applicant but fails to particularize any allegation(s) in that respect. Generally, a hearing becomes necessary when there is a dispute with respect to some material fact or the Board needs or wishes to have the evidence or representations of the parties with respect to one or more issues before the application can be disposed of (see *Black & MacDonald Limited*, [1987] OLRB Rep. Oct. 1208; *Dewform Ltd.*, Board File No. 0771-88-R, July 14, 1988 unreported). In this case, the materials filed are sufficient to enable the Board to dispose of the applicant and, in our view, there is no other reason to hold a hearing.

9. Section 1(3) of the Act provides, *inter alia*, that, subject to section 90 (which is not relevant to our considerations herein), no person who exercises managerial functions, or who is a member of the land surveying profession entitled to practise in Ontario and is employed in a professional capacity shall be deemed to be an employee for purposes of the Act. Accordingly, and having regard to the Board's decision in *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169, and pursuant to section 144(1) of the Act, the Board finds that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing or maintaining of same and those engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. In support of this application for certification, the applicant filed three combination

application for membership and attached receipt documents. All three are signed by the employees to whom they refer and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date for the application. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency of this membership evidence.

11. The list of employees filed by the respondent contains four names on Schedule A. Two of the individuals named have been classified by the respondent as “party chief”. The Board is satisfied, however, that whether or not either or both of these individuals are professional land surveyors so employed or exercise managerial functions, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 13, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(10) of the Act.

12. Consequently, for the reasons given in *Robin Hood Multi-Foods Inc.*, [1985] OLRB Rep. July 1159, (at paragraphs 6 to 11) with which we agree and adopt herein, there is no need to delay the disposition of this application (see also *Superior Contracting* [1988] OLRB Rep. Dec. 1348.

13. Consequently, and pursuant to the provisions of section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 1 above in respect of all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing or maintaining of same and those engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.

14. Further, and also pursuant to section 144(2) of the Act, a certificate will issue to the applicant in respect of all employees of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing or maintaining of same and those engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.

2570-88-R Labourers' International Union of North America, Local 183, Applicant v. **Beaverbrook Estates Inc.**, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Union applying for unit of all labourers in the ICI sector province-wide plus all labourers in all other sectors in Board area 8 - Employer arguing that labourers in Board area 18 should be included in the unit - Board concluding that employees in Board area 18 not properly on employee list

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

APPEARANCES: *Bernard Fishbein*, *L. Baldassarra* and *M. Fasan* for the applicant; *Stephen A. McArthur* and *Murray Parton* for the respondent; no one appearing on behalf of the objectors.

DECISION OF INGE M. STAMP, VICE-CHAIR, AND BOARD MEMBER H. KOBRYN; April 11, 1989

1. This is an application pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. A timely statement of desire or "petition" was filed with the Board signed by a number of employees indicating that they wish to oppose the union. No one appeared on behalf of the petitioners on the day scheduled for hearing this matter. Since there is no evidence before the Board as to whether the petition represents the voluntary wishes of the employees who signed it, the Board will not give it any weight.

5. The parties disagreed on the description of the bargaining unit. The applicant had applied for its standard ICI province-wide and Board Area 8 bargaining unit. The respondent

stated that the proper bargaining unit is province-wide ICI and Board Areas 8 and 18. The respondent took the position that there were 5 labourers working in Board Area 18 and that they should be included on the list of employees who are in the bargaining unit. The respondent submits that if the Board excludes the 5 labourers it would in effect be making a sector determination and that this is contrary to the Board's policy in applications for certification in the construction industry.

6. The applicant's position is that it is entitled to apply pursuant to section 144(1) for ICI province-wide and one or more Board areas in all other sectors, provided it represents employees in the particular Board area or areas. The applicant submits that an application pursuant to section 144(1) only has to be provincial in scope for the ICI sector and not for any other sector. The applicant does not represent the employees in Board Area 18 and no one is asserting that the employees in Board Area 18 are working in the ICI sector.

7. After considering all of the submissions of the parties and the cases cited, the Board finds that the 5 employees in Board Area 18 are not properly on the list of the employees in the bargaining unit. The Board in *Dagmar Construction Limited*, [1987] OLRB Rep. Apr. 480 stated that a trade union under section 144(1) of the Act can apply for ICI and one or more Board areas but is not required to apply for more than one geographic area.

8. Having regard to the above, the Board finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The parties agreed to the deletion of D. Resendes and M. Resendes from Schedule "A". The applicant is challenging three individuals of the remaining six employees listed on Schedule "A", on the following basis:

L. Melchiore	section 1(3)(b) managerial exclusion; not at work
T. Oresti	same as above
F. Talarico	not performing bargaining unit work.

10. Having regard to the above, the Board hereby appoints a Labour Relations Officer to inquire into the list and composition of the bargaining unit and report back to the Board with respect to:

- (i) conducting a check of the respondent's records for the purpose of enabling the Board to determine whether L. Melchiore and T. Oresti were at work on the application date;
- (ii) inquiring into the duties and responsibilities of L. Melchiore and T. Oresti for the purpose of enabling the Board to determine whether they exercised managerial functions;
- (iii) inquiring into the nature of the work performed by F. Talarico to determine whether he performed bargaining unit work on the date of application.

11. This matter is referred to the Registrar.

DECISION OF BOARD MEMBER W. GIBSON; April 11, 1989

1. I dissent from the majority decision in this case, which does not come to grips with the realities of the construction industry from an employer's point of view.
2. Here we have an employer engaged in residential construction in Southern Ontario, using the combined base of Barrie and Toronto. He had 6 employees in the Toronto area, and 5 in the Barrie area on the day of application. He does not see these as two separate geographic areas, but his one business area, within which employees should be freely interchangeable.
3. The majority decision will leave the 5 Barrie employees unrepresented. If the employer engages in ICI work in the Barrie area, it is to be hoped that the union will offer union membership to these employees, so that they will not be prevented from working for their employer on ICI work. Unfortunately, the union is not obligated to do so, and these 5 employees might find themselves out of work as a result of this decision. From the employees' point of view, they surely see themselves as the 11 employees of Beaverbrook Estates, *all of whom* should either be represented or not represented.
4. The Board also has a policy not to make sector determinations in certification applications. This was not an issue in this case where the parties agreed that the 5 Barrie employees were engaged in residential construction on the day of application. However, as it is quite a common practice for many construction employees to move between the non-ICI and ICI sectors from time to time, it does raise the issue of those employees left unrepresented by the granting of a province-wide ICI certificate to a union in cases like this.
5. The 5 Barrie employees should have been included in the list of employees in the bargaining unit.

3097-88-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Brian Chevrolet Oldsmobile Ltd., Respondent v. Group of Employees, Objectors

Certification - Petition - Board reviewing system of certification in Ontario - Following petition inquiry Board finding that first seven signatures on petition were voluntary but not the rest - Remainder of signatures were obtained following a meeting with senior management where it was indicated that joining the union would put jobs at risk - Number of voluntary signatures not diminishing the support for certification to the point where the Board would order a vote - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *M. Rozenberg* and *D. A. Patterson*.

APPEARANCES: *C. Meneghini*, *H. Powers* and *Kevin Shelton* for the applicant; *Grant E. Black*, *David D'Amico*, *Marlene Barker* and *Peter Kotssilidis* for the respondent; *Roberta L. Mater* for the objectors.

DECISION OF THE BOARD; April 24, 1989

I

1. This is an application for certification. The name of the respondent is amended to read: "Brian Chevrolet Oldsmobile Ltd."
2. The Board finds that the applicant is a trade union within the meaning section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the initial agreement and subsequent representations of the parties, the Board finds that the unit of employees appropriate for a collective bargaining should be framed as follows:

All employees of the respondent in Welland save and except foreman, persons above the rank of foreman, office and sales staff.

The Board notes that this bargaining unit description was settled, *on agreement*, at the outset of the hearing, and that the Board rejected the respondent's later request to propose further bargaining unit exclusions. By that time, the membership count had been revealed and it was apparent to all that the "arithmetic of certification" might be "close". In the circumstances, the Board did not consider it appropriate to permit the respondent to change its position. In any event, pursuant to section 6(1) of the Act, the Board is satisfied that the unit described above is appropriate for collective bargaining.

II

4. In support of its application for certification, the trade union filed documentary evidence of membership on behalf of more than seventy-five per cent of the employees in the above-mentioned bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector"). They indicate that a payment of one dollar has been made to the union in respect of its membership fees. The one dollar payment is in the nature of consideration and confirms the act of signing.
5. The documentary evidence is supported by properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing or to suggest that the employees were not, at the time, indicating their desire to be represented by the applicant union.
6. The documentary evidence meets the requirements of section 1(1)(l) of the Act and the form and time limits prescribed pursuant to section 103(2)(j) of the Act. All of the cards were filed with the Board on or before the terminal date. Accordingly, this evidence, standing by itself, demonstrates that the union has a level of "membership support" well in excess of that required by section 7(2) of the Act, for certification without recourse to a representation vote.
7. There was also filed with the Board a timely "statement of desire" or "petition", signed by a number of employees indicating that they wish to oppose the certification of the applicant. This timely petition included the names of certain individuals who had previously signed membership cards and paid one dollar in respect of membership fees, and, therefore, were "members" of

the union within the meaning of section 1(1)(l) of the Act. These individuals had had a purported change of heart, and allegedly no longer wished to support the applicant's certification. It was apparent that if the change of heart was a voluntary one so that the union's documentary evidence may not reflect the employees' subsequent wishes, the Board, (in accordance with its usual practice), would exercise its discretion to order a representation vote to resolve the question.

8. This is the course of action urged upon us by both the respondent employer and the employee objectors. They argue that, in the circumstances of this case, the formalities required by the Act and the Board (writing, signatures, consideration, witnesses) are still insufficient to indicate the employees' real intentions - even though in a commercial context they might be quite sufficient to create binding and enforceable contractual obligations. They argue that a representation vote is necessary to clear the air and determine what the employees really want. The union replies that the petition is not a voluntary expression of employee wishes and therefore does not provide a reliable basis for the exercise of the Board's discretion to direct a vote.

III

9. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about trade union representation (see Rule 73(2) which prohibits that), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent. To protect employees from possible employer reprisals the anonymity of the union supporters is preserved (see section 111 of the Act).

10. This process has been in place for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(l)). Indeed there is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases - as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Representation votes are a residual mechanism resorted to where the union cannot demonstrate the support of a "clear majority" (i.e., more than fifty-five per cent) based upon "untainted" membership cards, or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a timely and voluntary change of heart by employees who have previously signed union membership cards.

11. Neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. They may voluntarily sign a membership card one day, but later wish to reconsider their support for collective bargaining. In some jurisdictions the statute precludes or inhibits such expressions so that certification is based solely on membership cards. In others such expressions are irrelevant because the preferred method of testing employee wishes is a representation vote. Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evi-

dence of a representation vote where employees have put before the Board a timely “petition” or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

12. The Board recognizes that “statements of desire” (see Form 6), usually in the form of a “petition”, are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration, confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice; and in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where:

- (1) the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and
- (2) the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these “members” (in accordance with section 1(1)(l)) continue to support certification.

13. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management.

14. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? An employee can be reasonably assured that his support for the union will not be communicated to his employer, but he may have no such assurance concerning his refusal to sign a petition opposing the union.

15. Frequently, (again as in the present case), petitions are openly circulated on or near the employer’s premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of employer conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board’s experience there are enough instances where employers have sponsored or supported anti-union petitions, or have threatened layoffs, cut-backs or plant closures if the employees opted for collective bargaining, that these employee fears cannot be discounted.

16. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

“In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also usefully be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, where the Board reaffirmed its approach to such employee statements:

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involves petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures placed on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union.

It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

With this background, then, we turn to the circumstances of the instant case.

IV

17. A hearing in this matter was held in Toronto on Friday, April 7, 1989. At the conclusion of the evidence, both the applicant and the respondent made representations respecting the witnesses' relative credibility. We have considered those representations but we do not think that this case turns upon the veracity of the various witnesses. In our opinion, all of the witnesses gave their best recollection of the events in question, and any gaps or inconsistencies were related to the natural inability of witnesses to recall with precision events which were not considered legally significant at the time. We do observe, however, that:

- a) Dino Pennimpede who was actively involved in the origination, preparation and circulation of the petition and, on the evidence, instigated an employer- employee meeting about which there was much controversy, did not give evidence.
- b) Brian Cullen, the owner of the respondent, whose remarks were also the subject of debate did not give evidence.
- c) David D'Amico, the general manager, who took notes of what was said at that meeting did not refer to those notes when giving his evidence and, in any event, did not significantly contradict the recollections of the union witnesses who were present.

18. In the discussion below, we will occasionally refer to employees as P1, P2, P3, etc. We do so because, pursuant to section 111 of the *Labour Relations Act*, the Board endeavours to maintain the confidentiality of persons who signify support for, or opposition to, a trade union. We will also base our decision upon the documentary evidence before us, even though the representative of the objecting employees testified that there was some confusion on the part of some of those who signed her anti-union document, with the result that they may have signed under the impression that they were *affirming* their support for the union.

V

19. The only witness on behalf of the petitioners was Roberta Mater. Ms. Mater has been a

parts clerk for approximately 7 months. However, the idea of a petition against the union was not exclusively her own. That idea came from Pennimpede who suggested that if an anti-union petition was filed with the Board by March 29, 1989 the union's certification application might be rejected. Mr. Pennimpede's observation may have been based upon the text of the Form 6 notice which had been posted the day before and which sets out both the way in which employees may register their objection and the time by which they must do so. We do not know precisely where the idea came from.

20. On the evening of March 22, Ms. Mater made a photocopy of the Form 6 document, which she took home for further consideration. From her reading of the notice, she drafted a rough copy of the petition. The following morning she surreptitiously typed the document which eventually made its way to the Board. We use the term "surreptitiously" because she does not normally use the typewriter in question, and when another employee appeared on the scene, she misrepresented what she was doing. She told the Board that, on her husband's advice, she was trying to "keep the petition quiet" because if she talked to management it might be rejected. She also told the Board that she had no conversations about the petition with any member of management.

21. Mr. D'Amico was firm in his recollection that he had heard about the petition or the possibility of a petition on March 22, the day before it was actually drafted and circulated. Mr. D'Amico could not recall how he came by this information. He said that he "heard it on the grapevine".

22. If Mr. D'Amico is correct, management was somehow aware of the petition before it was even drafted. At the very least, management was aware of the petition at the time of the above-mentioned meeting which took place on March 23rd.

23. Once the petition was typed it was hidden in a wiper blade box in a stock room close to where Ms. Mater works. Both she and Mr. Pennimpede brought persons there to sign the document. Employees P1 to P7 signed the petition in the stock room between 8 and 10 a.m. on March 23. In all but a couple of cases, Ms. Mater was personally present to witness those signatures. We do not know what was said to those employees by Mr. Pennimpede to prompt them to sign.

24. On March 23rd, at approximately 10:00 a.m. there was a rather unusual meeting of employees with the respondent's senior management. It is not entirely clear how that meeting came about. We were told that it was arranged by Mr. Pennimpede who approached management to demand an immediate meeting with Mr. Cullen, the company's owner. Since neither the management officials approached nor Mr. Pennimpede gave evidence, we do not know the substance of those discussions. We do know that it is not common for such meetings to take place on company premises during working hours.

25. We also know that at this rather unusual meeting took place, that Mr. Cullen did address quite a number of employees and that the seating arrangements for the meeting placed Ms. Mater and Mr. Pennimpede at the head of the table directly in front of Mr. Cullen and Mr. D'Amico. There is really little doubt about the apparent leadership role of the two prime-movers behind the petition or that this was recognized both by management and the employees in attendance. At the meeting they were provided with letters confirming that the meeting was not instigated by management and promising to improve ventilation in one area of the shop - a matter of some concern to certain employees. Indeed, according to Ms. Mater, some employees had earlier told her that if the company was prepared to make that commitment they would sign her anti-union petition.

26. In his remarks to the employees, Mr. Cullen canvassed or responded to a number of employee concerns. Some of these were unexceptional and need not be canvassed here. What is

more troublesome is the employer's repeated indications that if the employees opted for collective bargaining (as is their right under the Act) there would be a reduction of work opportunities, layoffs and the subcontracting of work now done by members of the bargaining unit.

27. We have no doubt that, whether the employer intended it or not, that was the message which employees could reasonably take from that meeting: joining the union put their jobs in jeopardy. At one point, Mr. Pennimpede openly demanded of a union supporter whether "if the union gets in and I lose my job you are going to pay my mortgage". When Mr. Pennimpede asked whether his job was safe, he was told by Cullen that he didn't know. This conversation occurred in the context of a discussion about job loss at the respondent's unionized location in St. Catharines.

28. Witnesses Stoop and Cavers told the Board that they were under no illusion about "the message". Stoop said that he and others wanted trade union representation but did not want their fellow employees to lose their jobs. Cavers testified that as a result of Cullen's remarks he concluded that if he did not sign the petition he would lose his job, and assumed that Cullen would be aware of who had signed and who had not. As it turned out, just as the meeting was concluding Ms. Mater left her place near the head of the table, came around to where Cavers was sitting, presented the petition to him, and collected his signature. At the time Cullen and D'Amico were still at the other end of the table. Other employees signed the petition immediately after the meeting.

DECISION

29. The circumstances of this case are a little unusual because we are persuaded that *some* of the signatures reflect the voluntary wishes of the signatories, but we are not persuaded they all do. The evidence is somewhat incomplete about the origination and circulation of the petition and the role of Mr. Pennimpede whose idea it allegedly was, who was present when many of the signatures were collected, who arranged the meeting with management mentioned above, and who was a principal actor at that meeting; however, these matters, even when viewed cumulatively, do not really cast doubt on the "voluntariness" of the signatures of P1 to P7. We do not think P1 - P7 would reasonably conclude or suspect the hand of management in the circulation of the petition.

30. On the other hand, we are not persuaded that the petition document reflects the voluntary wishes of signatories P8 to P13 who signed not only after particular promises made to the employees, but also after obvious (even if unintentional), indications from senior management that joining a trade union or engaging in collective bargaining would result in a loss of their jobs. That was the inference taken by witnesses Stoop and Cavers, and, in the circumstances, it was an entirely reasonable one. Whether or not the respondent actually *would* reduce its staff if the employees were unionized is not in question. That is the consequence which it outlined for the employees; and it is hardly surprising, thereafter, that quite a number of union supporters almost immediately signed the anti-union petition.

31. In summary, therefore, we are prepared to accept as voluntary employee expressions, the signatures on the petition of employees P1 to P7. We are not prepared to accept as voluntary the signatures of employees P8 to P13, or to give the petition document any weight insofar as their signatures are concerned.

32. What is the result? As we have already mentioned, the union has tendered documentary evidence of membership on behalf of the overwhelming majority of employees in the bargaining unit, but, as we have also found, certain of those employees have voluntarily registered a "change of heart". However, their number does not diminish the support for certification to the point where the Board would exercise its discretion to direct the taking of a representation vote. Even if we accept the "voluntariness" of the petition in respect of employees P1 to P7, the union's

application for certification still enjoys the voluntary support of more than 55% of the bargaining unit employees.

33. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 29, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

34. A certificate will issue to the applicant.

2638-88-R; 2669-88-R Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, Applicant v. **The Butcher Engineering Enterprises Limited**, Respondent; Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, Applicant v. **The Butcher Engineering Enterprises Limited**, Respondent

Certification - Trade Union - Trade Union Status - Applicant so named had not been found to be a trade union in any previous proceeding -Applicant leading evidence at hearing to show that it was the same organization which had been found to be a trade union in another proceeding - Applicants for certification cautioned to consistently use the same name - Jurisprudence on issue reviewed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. Patterson*.

DECISION OF VICE-CHAIR, OWEN V. GRAY AND BOARD MEMBER, G. O. SHAMANSKI;
April 21, 1989

1. These are two applications for certification in which the Board conducted pre-hearing representation votes. In its applications the applicant described itself as "Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880". It did not appear from the Board's status records that an applicant so named had in any previous proceeding been found to be a trade union, although an organization named "Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880" had been found to be a trade union in Board File 12109-66-R. When this was brought to the applicant's attention by the Registrar, the applicant asserted that it was the same organization as had been found to be a trade union in Board File 1844-88-R under the name "Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

2. At the pre-vote meeting between one of the Board's Labour Relations Officer and representatives of the applicant and respondent, the respondent did not concede that the applicant was the same organization as had been before the Board in File 1844-88-R. Its position was that the Board should inquire into the question of the applicant's "status."

3. The application came on for hearing before this panel on April 5, 1989. The applicant filed its bylaws. According to those bylaws, the applicant's name is "Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880". (The title of this proceeding has been amended to name the applicant that way.) The applicant led evidence which satisfied us that it is the organiza-

tion which applied for and was granted certification in Board File No. 1844-88-R in the name "Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

4. No doubt mindful of the passage from *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517 quoted in the Registrar's letter to it (see paragraph 8 of the Board's earlier decision in these applications, reported at [1989] OLRB Rep. Feb. 109), counsel for the applicant also led evidence to establish (as it did) that the applicant is a trade union without relying on section 105. We wish to make it clear that in our view, section 105 of the Act can apply to an applicant which relies on a previous finding that a differently named organization is a trade union, if the applicant satisfies the Board that it is in fact the organization which was the subject of that earlier finding: see *Canadian Johns-Manville Co., Limited*, [1971] OLRB Rep. Apr. 209; and, *Consumers Distributing Company Limited*, [1981] OLRB Rep. May 509. In this case it was enough for the applicant to establish, as it did, that it is the organization which was found to be a trade union in Board File 1844-88-R. That is *prima facie* evidence in this proceeding that the applicant is a trade union within the meaning of clause 1(1)(p) and, there being no contrary evidence, we so find.

5. After the pre-hearing votes were conducted and within the period prescribed for making written submissions with respect to the conduct of the vote, the applicant wrote to the Registrar as follows:

The applicant hereby objects to the conduct of the representation votes held in these matters on March 9, 1989. The applicant is advised that certain employees acting as agents for management misconducted themselves during the voting at the plant in St. Clair Beach (Board File No. 2669-88-R) in such a manner as to undermine the reliability of the vote results as a indication of the true wishes of the employees. Specifically, two employees stood outside the entrance to the polling station during the vote holding large signs saying "VOTE NO". The applicant is currently investigating this and other is conduct by the respondent and/or employees acting on behalf of the respondent and will be filing a formal complaint shortly.

In a letter to the Registrar dated March 28, 1989, the respondent's counsel noted that no complaint had been filed, and demanded that full particulars be provided forthwith so that the respondent could prepare to deal with the allegations at the hearing which had by then been scheduled for April 5, 1989. By letter sent to counsel for the applicant and copies to the Registrar, the respondent's counsel noted that he had been provided with the names of the two alleged agents and that the respondent's position was that the named individuals did not exercise managerial functions and were not otherwise agents of the respondent on the occasion in question. He also noted the agreement of the applicant and respondent that

... both the Applicant and Respondent request that only the issue of status be heard on April 5th next and that the Applicant and Respondent will be requesting the Board that any allegations regarding the conduct of Messrs. Adams and Murray, and any charges that may be filed, be scheduled for hearing on another date.

6. At the hearing of April 5, 1989, counsel for the applicant was unable to say whether the applicant would be pursuing its complaint and, perhaps, requesting certification under section 8. He requested that the application be further adjourned to await the applicant's decision in that regard. Counsel for the respondent fairly noted that he felt bound by the earlier agreement to join in the request for adjournment. In the circumstances, and particularly as to do otherwise might prejudice the respondent, we granted the adjournment. We noted, however, that the delay seemed inappropriate, and advised counsel that if within one week the Board had not received any complaint from the applicant, this panel would issue a decision directing that the ballots be counted. Within that week the applicant did file a complaint which brings into question the reliability of the

vote conducted in Board File 2669-88-R. No question is raised with respect to the vote conducted in Board File 2638-88-R.

7. We direct that Board File 2669-88-R be scheduled for hearing to deal with the allegations raised in the applicant's complaint insofar as they affect the disposition of that application. We anticipate that the Registrar will list the complaint for hearing at the same time before the same panel. It will be for the panel before whom the application and complaint are listed for hearing to determine how they should be heard.

8. We direct that the unsegregated ballots cast in the pre-hearing vote taken on March 9, 1989 in Board File 2638-88-R now be counted.

DECISION OF BOARD MEMBER D. A. PATTERSON;

1. I concur with the decision of the Board on this decision but feel obliged to elaborate in writing what I expressed to counsel for the applicant orally on the day of the hearing.

2. My comments are not so much a criticism of the applicant but rather should be interpreted as a simple response to the problem of status the applicant was confronted with at the hearing.

3. For the benefit of counsel for the applicant and other of its Local Unions which have certificates of status on file with the Board, closer scrutiny revealed that the Teamsters, Chauffeurs, Warehousemen and Helpers Union and its Local Unions number 24 to date in the province. These 24 Local Unions have a total of 37 certificates of status on file with the Board. Some locals have up to 4 separate certificates of status on file. These certificates of status represent various configurations of one another.

4. The applicant in this case has 3 separate certificates excluding the present case, which when released would give the applicant 4 different certificates of status on file. A number of other Local Unions of the International union have more than 1 certificate, they are:

- L.U. 230 - 3 certificates of status
- L.U. 91 - 4 certificates of status
- L.U. 352 - 2 certificates of status
- L.U. 419 - 2 certificates of status
- L.U. 847 - 2 certificates of status
- L.U. 879 - 2 certificates of status
- L.U. 647 - 2 certificates of status

5. The problem which counsel for the International Union must address via the staff and/or Local Union Officers is what name does the respective Local Union wish to operate under. The Board has no preference, but when an application is submitted to the Board, if the Board finds the name applied under does not match the certificates of status on file then the applicant receives a letter from the Registrar asking the applicant to reply with the correct name or Board file under the applied name in which the Board found it had status. Failure to respond obligates the Board to schedule a hearing where the applicant has to prove status.

6. The crux of my concurring opinion is simply this: The Board doesn't concern itself with what name any applicant uses in applying for certification after the applicant has been found to prove status as long as the same applicant consistently uses the same name. If this procedure was

followed applicants would not be in hearings proving status to the Board. The time, money and energy could be better spent on more pressing matters.

7. I also think it is appropriate to cite some recent jurisprudence which also hopefully brings the point to bear on the applicant and its Local Unions. In *Pioneer Mechanical Limited*, [1989] OLRB Rep. March 277, the Board quoted *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517 at paragraph 3 of its decision:

3. The Board's comments in *Hartley Gibson Company Limited*, *supra*, [sic] should neither be taken out of context, nor applied without regard to the rationale for sections 104 and 105 of the *Labour Relations Act*; that is, that certification proceedings, which are supposed to be expeditious, do not become bogged down over matters which do not reveal any concern of substance. The Board is concerned with the label used by a trade union to identify itself to the extent that it adequately identifies it as such. For purposes of the provisions of section 105 of the *Labour Relations Act*, the label used by an applicant for certification must adequately identify it as an entity which the Board has previously found to be a trade union. In that regard, the Board will generally be concerned only with differences of substance between a label which has been found to identify a trade union (within the meaning of section 1(1)(p) of the Act) and the label used by an applicant for certification. Consequently, in the absence of an allegation that it is of some real significance, the Board will not normally concern itself with differences in punctuation, like the use of a comma instead of a dash (or, for example, an "&" instead of the word "and") which are no more than different ways to accomplish the same end; that is, to separate parts of a sentence or label. Nor, in the absence of specific allegations, will the Board be concerned with obvious *bona fide* minor mistakes in the naming of an applicant for certification (see section 104 of the Act), or different presentations of what is obviously the same thing, like, for example, use of the word "Pipefitting" instead of the words "Pipe Fitting". In our view, it would be unnecessarily technical and a waste of time and resources to do otherwise. In this case, there is no difference of substance between the two labels in question.

8. The same issue was addressed by a differently constituted panel of the Board in *The Corporation of the City of Gloucester*, [1989] OLRB Rep. March 241 in paragraphs 4, 10 and 13:

4. Under section 105 of the Act, an organization of employees may benefit in subsequent proceedings from the Board's initial finding that it is a trade union within the meaning of clause 1(1)(p) of the Act. That finding serves as *prima facie* evidence that the organization is a trade union. Thus a trade union normally does not have to provide evidence that it is a trade union every time it makes an application. Because of the reliance on the initial finding, however, the Board must be satisfied that the organization making the subsequent application(s) is the same organization which was found to be a trade union. Any deviation in the name under which the organization applies in subsequent applications from that under which it applied in the proceeding in which it was found to be a trade union may raise doubts about whether it is in fact the same organization. The name must be exactly the same.

10. We have detailed the evidence in this matter because it illustrates a not uncommon aspect of the application of section 105 and clause 1(1)(p) of the Act: put simply, some organizations are careless about ensuring they apply in subsequent applications in exactly the same name as the name under which they were found to be trade union. Yet they seek the benefit of section 105 of the Act. That benefit, however, has a price, albeit, in our view, a not particularly onerous one: the organization must make the effort to use the name under which it has been found to be a trade union exactly and consistently. Failure to do so runs the risk at least of having to prove trade union status each time it makes an application or whenever it applies under a slightly different name and possibly, of delay, extending of the terminal date or even dismissal of the application.

13. We also advised the applicant that it had to stop making applications under a variety of names and that it might well be put to strictly proving its status in future applications should there be any discrepancy between the name in which it has been found to be a trade union in this proceeding and the name in which it applies in future applications.

9. Another case that came before a panel of the Board also addressed the issue in *Humpty Dumpty Foods Limited*, [1989] OLRB Rep. Feb. 147 at paragraph 9:

9. No certification order can issue to an organization other than one which has proved to the Board that it is a trade union within the meaning of the Act. Once it has been so proven, however, it need not do so again in cases of further applications. Because of section 105 of the Act, the Board has established a procedure to identify organizations which it has already identified as trade unions. Once an organization has been so identified, the certification process can be speeded up because there is one less issue for the Board to determine. This permits the parties to make use of the "waiver" procedure and, on agreement, avoid a formal hearing before the Board. As a result of the importance the Board places on this matter, any deviation from the name the Board already has on its files as being a trade union will result in the issue of "status" having to be determined. Thus, the applicant will have to prove it is a trade union or it may prove that, in spite of a difference in nomenclature, it is the same organization as a trade union previously granted "status".

10. In *Mediacom Inc. Backlight Graphics Division*, unreported, File No. 2957-88-R, March 17, 1989, the Board made reference to an earlier decision *Butcher Engineering Enterprises Limited* at paragraph 7:

7. ...

In *Butcher Engineering Enterprises Limited*, (decision dated February 21, 1989, Board File #2638-88-R, as yet unreported) the Board observed that:

11. We do not at this stage determine whether the applicant is a "trade union" within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"), nor whether the applicant is entitled to the benefit of the presumption in section 105 of the Act. Those are issues which go to the merits of the application. In an application in which a pre-hearing vote is requested, the merits are not determined until after any vote is conducted and the parties have had an opportunity of a hearing, as contemplated by subsection 9(4) of the Act. However, we do at this stage determine whether the ballots cast in the pre-hearing votes in these applications should be counted before any hearing is conducted. That generally turns on whether the applicant will have to prove something at hearing before it can be found to be a "trade union": see *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316 at paragraph 9.

12. An applicant for certification is expected to correctly name itself in the space for "Applicant" in the title portion of an application for certification. When an applicant places words in that space, that is taken to signify that those words form part of the applicant's name. Everything an applicant writes in that space is taken as being significant and essential part of the organization's name and not, for example, a collateral statement of its affiliations with or memberships in other organizations. If such collateral statements are necessary at all, they belong in the body of the application, not in its title. Where the name by which an applicant organization describes itself in its application for certification is different from the name under which any organization has previously been found to be a trade union, the benefit of section 105 is unavailable to the applicant unless and until it can show that it is a continuation of one of the organizations previously found by the Board to be a trade union and that the change in name since that finding is not coincident with other constitutional changes which have altered its character: see generally *Coca Cola Ltd.*, [1985] OLRB Rep. Nov. 862; and, *Consumers Distributing Company Limited*, [1981] OLRB Rep. May 509. Thus, where an organization applies under a name different from one under which it has previously been found to be a trade union, it has something to prove at hearing before it will be so found in the new application.

13. For reasons best known to them, some trade unions are not particularly careful to always describe themselves by the name set out in their constitution or bylaws: from time to time they describe themselves by "aliases" consisting of contractions, expansions or approximations of their proper name. Indeed, if counsel's representations are

correct, that is what this applicant did in Board File 1844-88-R, since the name under which that application was filed is not the name in Section 1 of the Bylaws enclosed with counsel's letter. An organization which chooses to describe itself differently in different applications for certification can expect to be called upon to show that it is a trade union on each such occasion until all of the "aliases" under which it operates have been the subject of a finding in a Board proceeding.

11. For all the aforementioned reasons and cited jurisprudence I believe that the International Union and its Local Unions should clear up this situation as soon as possible. I don't believe the Board should be overly technical in its approach to applications and the name used such as a mere spelling mistake or missed comma etc., but at the same time I believe that the applicant union has an obligation to the members on whose behalf it is applying, to itself, and to any parent organization, to make its style of cause accurately reflect its own name, as it may be contained in an existing certificate of status on file with the Board.

1207-87-R The United Brotherhood of Carpenters and Joiners of America, Local Union 27, Applicant v. Calvano Lumber & Trim Co. Ltd., Respondent

Bargaining Unit - Certification - Employee - Individual riding around with employer's driver and helping to unload materials on an occasional basis - Individual given small sums of money or meal in return - Employer arguing that individual was a volunteer rather than an employee - Nature of employment relationship analyzed - Board finding that individual was a casual employee - Individual placed in unit with single other full-time employee - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *David McKee* and *Luis Camara* for the applicant; *Donald B. Jarvis*, *Barbara G. Wohl* and *Antonio Calvano* for the respondent.

DECISION OF THE BOARD; April 6, 1989

I

1. This is an application for certification which was filed on July 11, 1987. The matter first came on for hearing before the Board on September 24, 1987. The respondent did not appear at the hearing and, accordingly, on the basis of the material before it, the Board certified the union as bargaining agent for a unit of employees described as follows:

All employees of the respondent in the City of Mississauga, save and except office, clerical and sales staff, foreman and persons above the rank of foreman.

It appeared to the Board at the time that there were two employees in that unit, and that both had signed union membership cards. Those cards, it might be noted, authorize representation by the union "in all matters pertaining to rates of wages, hours of work, and other *conditions of employment*" (emphasis added).

2. Subsequently the employer sought reconsideration of that decision, claiming that notice was inadequate, and raising a variety of arguments which, if accepted, might either preclude the Board from issuing a certificate, or persuade it not to do so. A hearing to entertain those representations took place in Toronto on April 29, 1988. At that hearing, the parties reached an agreement specifying the outstanding issues between them, as well as the order in which they would be litigated. The Board accepted the parties' agreement on the order and manner in which those issues would be addressed.

3. At a hearing on June 24, 1988, counsel for the union and the respondent employer agreed that the only matter which would be addressed on that date was the allegation that an employee named Comeau had not, on his own behalf, paid at least one dollar in respect of union membership fees, so as to become a "member" within the meaning of section 1(1)(l) of the *Labour Relations Act*. The Board heard evidence of the circumstances in which Mr. Comeau signed the impugned membership card and concluded (for reasons set out in its decision of August 17, 1988 [[1988] OLRB Rep. Aug. 735]) that the card was valid and that he was both an employee of the respondent and a member of the trade union at the relevant times.

4. There were two remaining issues:

- (1) Was an individual named Luna also an employee of the respondent - because, if he was not, the bargaining unit would contain only one person and therefore could not be certified; and
- (2) should the Board segregate full-time and part-time/casual employees into separate bargaining units, with a result, again, that no certificate could issue in respect of either unit even if Luna was considered to be an "employee" within the meaning of the Act.

5. We note, parenthetically, that by this, the third day of hearing, Mr. Luna had long since departed from the scene, so that the parties' endeavours and those of their counsel were focused upon a bargaining unit which now consists of only one employee. It was for that reason that the Board appointed a Labour Relations Officer to meet with the parties and attempt to effect a settlement of the outstanding issues between them, without the necessity of a further hearing which would inevitably generate additional cost to the parties and to the public as well.

6. There was no general settlement; however, the parties were able to agree on certain facts which formed the basis of their arguments before the Board on March 14, 1989. Those facts are as follows:

1. Calvano Lumber & Trim Co. Ltd. (the "Company") is engaged in the business of supplying doors and trim to residential home builders. The Company does not manufacture its product. Installation of the product is performed by sub-contractors. The Company is not engaged in the Construction Industry. The President and owner of the Company is Antonio Calvano ("Calvano").

2. The Company has always employed a driver or drivers to deliver its product to residential building sites. Drivers work 8 a.m. to 5:30 p.m., Monday through Friday, and receive an hourly wage. The drivers are paid weekly and are subject to all applicable statutory deductions (i.e. unemployment insurance, Canada Pension Plan and income tax). All persons who are or have been employed as drivers appear in the Company's payroll records. Drivers

are given vacation time or vacation pay in compliance with the *Employment Standards Act*.

3. Russell Comeau ("Comeau") was employed as a driver by the Company on the Application Date of July 30, 1987. The parties disagree as to whether Sergio Luna ("Luna") was a driver-employee of the Company on the Application Date. Apart from Comeau and Luna, there were no other potential members of the bargaining unit on the Application Date.

4. The specific qualifications, duties, skills and responsibilities of a Company driver are set forth below:

- Drivers are responsible for ensuring that their time-cards are punched-in and punched-out of the Time Clock at the start and finish of each work day.
- Upon arrival at work, a driver will report to the shop foreman and receive delivery instructions. The foreman will tell the driver what supplies must be delivered to a particular site. The driver has knowledge of where all supplies are stored and is responsible for loading the specified supplies onto his truck. the shop foreman will give the driver copies of the Invoice/Delivery Slip pertaining to each delivery order.
- After delivery of the supplies to a particular site, the driver returns to the Company shop to receive new delivery instructions. The Company trucks do not have radio communication with the Company shop. The work day consists of going back-and-forth between various work sites and the Company shop.
- As the drivers are often required to make deliveries to sites they have never been to before, the drivers must be able to read maps and understand instructions given by the shop foreman.
- Upon arrival at a delivery site, the driver will communicate with either the Company's site supervisor or the sub-contractor who has been hired to install the supplies. The driver will unload the supplies and carry them to a location indicated by the site supervisor or sub-contractor. The driver will give a copy of the Invoice/Delivery Slip to the site supervisor or sub-contractor.
- Drivers are responsible for the maintenance and up-keep of the Company truck assigned to them. Drivers must ensure that the Company truck has sufficient gas and oil at all times. Drivers are given a Company credit card for the purchase of gas, oil and maintenance services.
- All drivers must have at least a Class "G" Driver's License

and be capable of operating a standard transmission vehicle. Before drivers are assigned a Company truck, the Company will evaluate the driver's driving skills by having a member of management attend with the driver on his first delivery assignment.

- Drivers are responsible for general maintenance and cleaning duties at the Company shop. At least once or twice a week drivers will be required to sweep up the Company shop. Drivers will also be required, on occasion, to unload and put away the supplies delivered to the Company by its suppliers.

5. During the early part of 1987 (sometime before the end of June), the Company employed a driver named Carlos Del Castillo ("Castillo"). During this part of 1987, Castillo also worked part-time at a Mexican restaurant on Adelaide Street East in Toronto. While employed at the restaurant, Castillo met Luna who frequented the restaurant. Luna was on vacation from Mexico and became an acquaintance of Castillo at the restaurant. Castillo introduced Calvano to Luna at this restaurant sometime before the end of June, 1987.

6. Subsequent to the time that Calvano met Luna at the restaurant, Luna appeared at the premises of the company with Castillo. A friendship developed between Luna and Calvano. In June, 1987, Castillo left the employ of the Company. However, Luna still attended at the Company after Castillo had ceased his employment.

7. Sometime after June, 1987, Luna attended at the Company premises and asked Calvano if he needed any help. Calvano said that Luna could ride around with the Company driver and help unload material. During the months of July, August and September, 1987, Luna appeared at the Company and offered to help a maximum of four times.

8. On those occasions when Luna appeared at the Company, Luna would ride with the driver and occasionally unload material. Luna neither drove any trucks nor received any instruction in the operation of such vehicles. Luna neither possessed nor was required to possess any of the qualifications, duties, skills or responsibilities listed in paragraph 4, *supra*.

9. Those occasions when Luna helped out were determined by Luna: Calvano neither requested nor solicited the assistance of Luna. Both the time and date that Luna would appear at the Company were without notice to the Company: Luna was not a part of any Company work schedule. The period of time that Luna would help out on each occasion varied from two to four hours. After the last time that Luna appeared at the Company to help out, Calvano never heard from or saw Luna again.

10. Luna never requested compensation of any kind for his assistance. However, Calvano voluntarily provided Luna with either a small sum of money (approximately \$30.00) or a meal after each occasion that Luna helped out. On approximately two occasions Calvano bought Luna supper and on approximately two occasions Calvano gave Luna around \$30.00. No vacation

pay was given to Luna after the last time that he appeared at the Company premises.

11. Calvano had no intention to enter into an employment relationship with Luna. Luna does not appear in any of the Company payroll records.

It was further agreed that Calvano never asked to see nor was shown a work permit or landed immigrant's visa, that Luna merely told Calvano he was on vacation from Mexico, and that Luna was neither a friend nor an acquaintance of Comeau.

7. With those reservations and additions, the argument proceeded without formal evidence.

II

8. Counsel for the employer maintains that Luna was merely a volunteer who appeared, occasionally, at the business of a friend to "help out"; and, when he did so, received a moderate financial reward, or dinner, in appreciation for his friendly assistance. This reward was in the nature of a gift or a token of appreciation. It was not "compensation" or indicative of an employment relationship. In the alternative, counsel argues that if Luna is not a "volunteer", he is properly characterized for *Labour Relations Act* purposes as an independent contractor. The employer argues that in either case he is not an "employee" within the meaning of the Act.

9. The union contends that Luna may not have been in a position to work on a regular basis because of his immigration status, but he was nevertheless an employee - albeit on a casual basis. In the union's submission Luna rendered services for compensation and such services were central to the kind of business operated by the employer. He was doing "work" for the company and each time he appeared and performed such work he was "paid" for it. The union submits that such "payment" was not a mere "handout" or "gift", but rather tied in a temporal and functional fashion to the services provided. The union contends that whether Luna "worked" for monetary reward or a meal, there was, nevertheless, the kind of exchange of labour for remuneration which characterizes an employment relationship. The union further argues that Luna cannot realistically be viewed as an "independent contractor" or a "self-employed" individual.

III

10. The parties put before us quite a number of cases concerning the legal definition of the terms "employee" and "independent contractor", and the "tests" for ascertaining a disputed person's status. Unfortunately, those cases were not very helpful since each turned on its own particular facts and the circumstances here are quite unique. For example; *Telkom Corporation*, [1986] OLRB Rep. June 892, *Regional Municipality of Hamilton-Wentworth*, [1982] OLRB Rep. Aug. 1179, and *Elizabeth Fry Society of Ottawa*, [1985] OLRB Rep. July 1026 all involved individuals working in non-profit organizations whose wages were subsidized by some government program. The Board found them to be employees. In *Dewson Private Hospital Limited*, [1983] OLRB Rep. Feb. 225 a person who had nominally retired but continued to work to "pay off" an outstanding loan to his employer was also found to be an "employee" for the purposes of the Act. On the other hand, in *York University*, [1981] OLRB Rep. May 601 certain promising graduate students were attracted to the university by the payment of cash grants. They performed various tasks, but the payments were not related to the actual work performed by the recipients, the selection was mainly based upon the financial need of the recipient, and the underlying documentation indicated that the grant was not considered employment income. The Board concluded that there was no real

employment relationship but simply a program for channeling money to deserving scholars without regard to whether any service was provided to the employer in return.

11. None of these cases is at all like the one currently before us.

12. The decisions of referees under the *Employment Standards Act* are not particularly helpful either. They are dealing with a different statutory regime where, it might be noted, one can be an employee for the purpose of that statute without any wages or remuneration in the ordinary sense at all (see section 1(c)(i) of the Act and compare section 1(c)(iii)). Thus, a referee held that an individual who regularly attended at an employer's premises for the purpose of gaining experience and learning about the business was not truly a "volunteer" even though he received no monetary payment; while an individual who gratuitously resided in a cabin and sporadically helped the owner and his friends build a house was not that owner's employee.

13. From the employer's perspective the closest case is an Employment Standards reference involving *Yamaha Keyboard Centre* (unreported) there the company took pity on a student who was a former employee. The student was allowed (in the referee's words) to "hang around" after his employment was terminated, helped out from time to time, and was the beneficiary of what the referee described as "charity" in the form of money, food, clothes, rent (for a room at the YMCA) and pocket money. If the student happened to be at the company's premises (which was not required nor requested) he might have occasionally helped in moving a piano, but the bulk of his time was spent either sitting around or playing an organ. The referee found that the student did not consider himself to be "working" and concluded that there was no employment relationship.

14. None of these cases are on all fours with the one at hand.

IV

15. Employment relationships may exhibit a variety of forms in different contexts, but the essence of such relationship is the exchange of labour for consideration in some form. Collective bargaining concerns the terms of that exchange and trade union representation permits even small groups of employees to improve them. It does not matter that an individual may not be "employed" or "paid" in a conventional way, nor does it matter that the alleged employee only works sporadically or shows up on the employer's doorstep and is engaged on a casual basis. Casual or day labour is quite common - especially in the construction industry. Finally, we do not think that Mr. Calvano's personal views determine the legal character of the relationship, even if he did not consider Luna to be an employee, did not engage or pay him on the same basis as Comeau, and thought he was merely helping out a friend. And, of course, we do not know Luna's view of the situation. All that we know is that he signed a document which speaks to representation in an *employment relationship*.

16. In our view, the essential elements of the equation are these: Luna appeared, asked if he could help out, was engaged for various periods of time and was paid, in one way or another, for the services provided. In our opinion the facts establish that, on the days in question, Mr. Luna was a casual employee of the respondent.

V

17. We will not here review the common law distinction between "employees" and "independent contractors", nor the way in which the Board has dealt with that issue since the passage of section 1(1)(h) of the Act. (However, see generally G. Sack and M. Mitchell "Ontario Labour Relations Board Practice" at pages 71-78, and cases such as *Algonquin Tavern*, [1981] OLRB Rep.

Aug. 1057 which analyzes that distinction at some length.) It suffices to say that, in our view, Mr. Luna is not an independent contractor. He owns no tools or equipment. He is not engaged in any entrepreneurial activity. He does not sell his services to the market generally. He has no specialized skills expertise or creativity. He carries on no business as such. He is not reasonably regarded as "self employed". He merely performed the manual work available to him in the manner directed by the respondent and in conjunction with the driver with whom he rode from time to time. He was simply a visitor to Canada who was augmenting his income from time to time, by a little casual labour provided to the respondent and for which the respondent paid in one way or another. We repeat: in our view, he was a casual employee.

VI

18. The respondent further submitted that even if we were to conclude that Luna was an "employee" for the purposes of the Act, we should find that in a situation where one employee was, at best, "casual/part-time" and the other was "full-time", two bargaining units should be fashioned in such manner as to put the full-time employee in one bargaining unit, and the part-time employee in another bargaining unit. The result of that, of course, is that *neither* would be entitled to engage in collective bargaining even though, as here, both employees have signed union membership cards.

19. The Board has made full-time/part-time distinctions in the past, but the Board has never made full-time/part-time distinctions in such manner as to prevent collective bargaining altogether. For example, where there is only one part-time employee so that there is no legally available part-time bargaining unit, s/he will be included with the "full-time" unit where, s/he has indicated a desire for collective bargaining. Likewise, in *Wickford Holdings Limited*, [1982] OLRB Rep. Oct. 1578 the Board declined to divide a two-employee cleaning team employed by an apartment block, because the husband worked full-time hours and the wife worked part-time. That is the practice which, in our opinion, should inform the exercise of our discretion in the instant case.

20. The Board finds that the unit described in paragraph 1 above is appropriate for collective bargaining.

21. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 17, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.

0282-88-R The Electrical Contractors' Association of Ottawa, Applicant v. International Brotherhood of Electrical Workers, Local Union 586, Respondent

Accreditation - Board finding all employers of journeymen electricians and apprentices for whom the Electrical Workers Union has bargaining rights in the residential sector in Board area 15 and Lanark County constitute a unit of employers appropriate for collective bargaining -Accreditation certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *S. C. Bernardo* and *John DeVries* for the applicant; *Thomas K. Moffatt* for the respondent; *Suzanne Duncan* and *Ron McMaster* for Johnson Controls Ltd.

DECISION OF THE BOARD; April 13, 1989

1. This is an application for accreditation in which the applicant seeks to be accredited as the bargaining agent for certain employers which have a bargaining relationship with the respondent.
2. Pursuant to Letters Patent issued on October 15, 1964, the applicant is an Ontario corporation without share capital. The applicant's Letters Patent and Bylaw No. 1 authorize it to represent employers in the electrical construction industry in labour relations matters, and to apply for accreditation with respect to any sector(s) in the construction industry in any geographic area(s) defined under the *Labour Relations Act* or determined by this Board. The applicant's status or entitlement to bring this application has not been challenged. On the basis of the evidence before it, the Board finds the applicant to be an employers' organization within the meaning of sections 1(1)(j) and 117(d) of the *Labour Relations Act*, and further, that it is a properly constituted organization for purposes of section 127(3) of the Act.
3. The respondent is a trade union within the meaning of sections 1(1)(p) and 117(f) of the *Labour Relations Act*.
4. The applicant and respondent negotiated that part of a collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario which relates to the geographic area and sector which are the subject of this application. This collective agreement was binding upon the members of the applicant and on the respondent and was in effect on April 29, 1988, which is the date this application was made. The applicant and respondent subsequently negotiated and are parties to a collective agreement effective from May 25, 1988 to June 30, 1990. This collective agreement covers a number of employers in the residential sector of the construction industry in the geographic area to which this application relates.
5. Having regard to the material before it, the Board finds that it has jurisdiction, under section 125 of the Act, to entertain this application.
6. The applicant filed evidence of representation on behalf of 52 employers. This evidence is in the form of 52 individual documents, each entitled "Authorization". These are all in a standard form and each authorizes the applicant to represent the employer signing it as its bargaining agent and to bargain on its behalf with the respondent for a collective agreement pertaining to and covering the residential sector, or part thereof, of the construction industry. Each authorization also authorizes the applicant to apply for accreditation, under section 125 of the *Labour Relations*

Act, "for the residential sector of the construction industry or such part thereof and in such geographic area or areas as the [applicant] shall deem appropriate". The applicant also filed a duly completed Form 88, Declaration Concerning Representation Documents which attests to the regularity and sufficiency of its documentary evidence of representation. The Board is satisfied that the applicant's evidence of representation complies with the requirements of sections 108 and 120 of the Board's Rules of Procedure. The Board is also satisfied that each of the individual employers on behalf of whom the applicant has submitted representation evidence has vested appropriate authority in the applicant to enable it to discharge the responsibilities of an accredited bargaining agent.

7. Having regard to the material before the Board, to the fact that the County of Carleton has been subsumed within the Regional Municipality of Ottawa Carleton as a result of the Municipal reorganization that led to the establishment of that Regional Municipality (see, *Walls and Ceilings Contractors Association of Ottawa - Association Des Constructeurs De Murs Et Plafonds D'Ottawa*, [1987] OLRB Rep. Jan. 174), the Board's decision in *Electrical Contractors Association, Quinte - St. Lawrence*, (Board File No. 0701-75-R, Jan. 28, 1976, unreported), and the agreement of the parties, the Board finds that all employers of journeymen electricians and apprentices for whom the respondent has bargaining rights in the Regional Municipality of Ottawa- Carleton, and the United Counties of Prescott and Russell, and the County of Lanark, in the residential sector of the construction industry, constitutes a unit of employers appropriate for collective bargaining.

8. In accordance with the Board's Rules of Procedure, notice of this application was sent to eighty-eight separate employers. Of these, two were returned as undelivered. These two and twenty-five other employers failed to make the requisite filings in Form 94 and Schedule H. On the basis of the information provided by the applicant and respondent, the Board is satisfied that the respondent has bargaining rights for all employees of all twenty-seven of these employers who are employed in the residential sector of the construction industry in the geographic area to which this application relates.

9. Only one of the employers served, Johnson Controls Ltd., indicated any opposition to the application, either in its filing or otherwise. At the hearing, Johnson Controls Ltd. did not oppose the application generally, or the ability of the applicant to make it. However, it did assert that the respondent does not hold bargaining rights for journeymen or apprentice electricians employed by it in the residential sector of the construction industry in the geographic area to which the application relates (the "bargaining rights issue"). The applicant, the respondent and Johnson Controls Ltd. all agreed that the latter had no employees affected by this application at any time in the year preceding the date on which this application was made. Accordingly, the presence or absence of Johnson Controls Ltd. could have no effect on the outcome of this proceeding. The applicant, the respondent and Johnson Controls Ltd. all agreed to hold the bargaining rights issue in abeyance and omit Johnson Controls Ltd. from any of the lists of employers for the application, without prejudice to the right of any of them to take whatever position they choose with respect to the bargaining rights issue in any future discussions or proceedings in which it arises.

10. On the basis of all the material and information before the Board, and having regard to the agreements between, and representations of, the parties, the Board has compiled the following lists of employers. The employers listed on final Schedule E are those who had employees affected by the application during the one year period preceding the date of application. The employers listed on final Schedule F had no such employees.

Final Schedule E

Ambor Electric Ltd.
Am-Tech Electrical Services Ltd.
A.M.S. Electric
Betron Electric Ltd.
Bisson Electric Ltd.
Black & McDonald Limited
Geo. Bolton (1983) Limited
George Bowie Electrical Ltd.
Broder Electric Ltd.
Campbell and Kennedy Electric Limited
Carling Electric Inc.
Earl Carr Electric Ltd.
Continental Electric Contractors Co. a Div. of Gramling Electric Ltd.
R. Diotte Electric Ltd.
Edison - Div. R. E. Ferguson Ltd.
Farley Electric Ltd.
Federal Electric (1976) Limited
J. W. Fraser Electric Inc.
Glebe Electric Ltd.
Glen-Mur Ltd. (also operating as G. M. Electric, 764651 Ontario Limited)
Hancock Electric Inc.
Heritage Ottawa Electrical Contractors Ltd.
D. E. Jackson Limited
Kroon Enterprises Limited
Lamarche Electrique Inc.
L. A. Legault Electric Limited
Blythe C. McCleary Limited
Newell Electric Inc.
Ottawa Valley Electric Inc.
Phil's Electric Limited
R. J. Electric
A. G. Reed Ltd.
Salter & Reid Electric Ltd.
Bob Storie Ottawa Limited
Tucker Electric Ltd.
Matt Anthony Electric Co. Ltd.
Bellefeuille Electric Ltd.
Roma Electric Ltd.
T. & M. Electric Limited

Final Schedule F

BG Checo International Ltd./BGE Div.
Brycor Limited
Comstock Canada
Denitron Electric Ltd.
E.N.H. Electric Ltd.
Emond Electric & Sons Reg.
Guild Electric Limited
MacFarlane Electric Ltd.
McCauley Electric Ltd.
Mieske's Capital Electric Limited
Net Electric Limited
Carl Saunders Electrical Ltd.
E. H. Scarabelli (1975) Inc.
Dieter Theile Electrical Contractors Limited
Univex (Canada) Ltd.
Wellington Electric (of Ottawa) Limited
Paul Ziebarth Electrical Contractors Ltd.

Ainsworth Electric Co. Ltd.
 Bradmoore Electric Co. Ltd.
 C. & M. Electric Ltd.
 Charmau Electrical Enterprises Ltd.
 Commonwealth Construction Co.
 D. B. L. Electric Ltd.
 Dent Enterprise
 Electro Systems
 Wm. Duffy Electrical Contractors Limited
 Faktor Electrical Services Ltd.
 R. W. Faulkner Electric Ltd.
 G. P. Electrical Cont. Ltd.
 Goldstein Bros. (1974) Ltd.
 Honeywell Limited
 K. B. Electric Ltd.
 Laurier Electric Ltd.
 Leslie & Palmer Co. Ltd.
 Marois Electric Ltd.
 McEwen Powerline Const. Ltd.
 Mosler Canada Inc.
 Ontario Electrical Construction Limited
 P. T. Industrial Electric
 Read Electric Inc.
 Regional Electric Ltd.
 Renovatek Electric Ltd.
 Respect Electric Inc.
 Donald Servant Electric Ltd.
 Tam-Mor Electrical Ltd.
 Vanier Electric Limited
 Willy's Electric Ltd.
 R. J. M. Electric Ltd.

11. On the basis of the material before it, and pursuant to the provisions of section 127(1)(a) of the Act, the Board finds that the 39 employers on Final Schedule E are the employers in the unit of employers on the date of the making of the application who have within one year prior to such date had employees for whom the respondent had bargaining rights in the residential sector in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and the County of Lanark, the sector and geographic area that the Board has determined to be appropriate.

12. The Board has also ascertained, pursuant to section 127(1)(b) of the Act, that the applicant represented 35 of the employers on Final Schedule E on the date of the making of this application. The Board is therefor satisfied that the majority of the employers in the unit of employers are represented by the applicant for purposes of this application. In addition, section 127(2)(c) of the Act requires that the Board be satisfied that the employers represented by the applicant employ the majority of the employees ascertained by the Board. Pursuant to section 127(1)(c), the relevant payroll period is the weekly payroll period immediately preceding the making of the application. The Board is satisfied that such a payroll period, in this case the weekly payroll period immediately preceding April 29, 1988, is a satisfactory period for making such a determination.

13. On the basis of the material before it, and pursuant to section 127(1)(c) of the Act, the Board finds that there were 212 employees affected by this application during the weekly payroll period immediately preceding the date of application. The Board further finds that the 35 employers represented by the applicant employed 197 of those employees. The Board is therefore satisfied that the majority of employers represented by the applicant employ the majority of the employees ascertained pursuant to section 127(1)(c) of the Act.

14. Having regard to all the foregoing, and in accordance with the provisions of section 127(2) of the Act, a certificate of accreditation will issue to the applicant for the unit of employers which has been found by the Board to be appropriate; that is, all employers of journeymen electricians and apprentices for whom the respondent has bargaining rights in the Regional Municipality of Ottawa- Carleton, and the United Counties of Prescott and Russell, and the County of Lanark, in the residential sector of the construction industry, and for such other employers for whose employees the respondent trade union may after the date hereof obtain bargaining rights through certification or voluntary recognition in the Regional Municipality of Ottawa- Carleton, and the United Counties of Prescott and Russell, and the County of Lanark, in the residential sector of the construction industry.

2753-88-G United Brotherhood of Carpenters and Joiners of America, Local 2041, Applicant v. F & R Charbonneau Construction Enr., Respondent.

Construction Industry - Construction Industry Grievance - Evidence -Grievance alleging non-union hire in violation of ICI agreement -Respondent not attending hearing - Applicant must prove that the work was performed by persons who were employed by the respondent and that they were employed in violation of the collective agreement - Applicant must also prove failure to make dues and other remittances - Applicant failing to prove the necessary elements of the grievance - Grievance dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *M. Eayrs* and *N. A. Wilson*.

APPEARANCES: *Sean T. McGee* and *Maurice Potvin* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; April 17, 1989

1. The name of the respondent is amended to read: "F & R Charbonneau Construction Enr."
2. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration.
3. When the hearing convened at 9:30 a.m. on Thursday, March 9, 1989, the respondent had not appeared. The parties had been duly notified by the Registrar of the date, time, place and purpose of the hearing. The Board adjourned the hearing for 30 minutes in the event the respondent had been delayed for reasons beyond its control. The hearing resumed at 10:05 a.m. The respondent was not in attendance at that time. The Board concluded hearing the evidence and the submissions of the applicant at 11:15 a.m. and the respondent had still not appeared.
4. The Board heard the evidence of Mr. Maurice Potvin who is employed as a field representative by the applicant trade union. He has been so employed for the past three years. For seventeen years prior to his employment with the applicant, Mr. Potvin had worked as a carpenter in the construction industry.

5. Based on the evidence of Mr. Potvin we are satisfied that the respondent is bound to the provincial collective agreement ("the ICI agreement") between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (O.P.C.). The applicant is an affiliated bargaining agent of the O.P.C.

6. The applicant alleges that the respondent violated that ICI agreement when it employed persons who were not members of the applicant union to perform work at a construction project, namely the remodelling of a pharmacy known as the Pharmacie Desjardins at 116 Clarence Street in the City of Ottawa ("the project"). The work on that project involved the installation of a suspended ceiling, some office partitions, a new store front entrance, and some acoustic and drywall work on the first and second floor of the building. The applicant alleges that the work performed at that project was work covered by the collective agreement and was work normally performed by the applicant's members. Based on the evidence of Mr. Potvin, we are satisfied that the "work" done on that project is construction work which is covered by the ICI agreement, and is work normally done by the applicant's members.

7. Based on the evidence of Mr. Potvin, we are also satisfied that the applicant had unemployed members ready and able to perform the work required on that construction project.

8. In order for the applicant to succeed in its grievance however, it is not sufficient for the applicant merely to establish the facts set out in paragraphs 5, 6 and 7. In order for this grievance to be allowed, the applicant must also prove, on a balance of probabilities that the work at the project was performed by persons who were employed by the respondent, and that those persons were employed in violation of the ICI agreement. Given the nature of this grievance and the damages requested, the applicant must also prove that the respondent failed to remit union dues or make the other remittances required under the ICI agreement to the union. In our view, the applicant has failed to prove the necessary elements of the grievance.

9. The only evidence tendered by the applicant in support of its assertion that the respondent had violated the ICI agreement came from Mr. Potvin. Mr. Potvin attended the project on December 5, 1988. While on site, Mr. Potvin spoke to Mr. Sylvain Mongeon who, according to Mr. Potvin, appeared to be the person "in charge". When he first approached Mr. Mongeon, Mr. Mongeon was carrying on a conversation with Mr. Charbonneau. Mr. Charbonneau is the principal owner of the respondent. Mr. Potvin did not however, speak to Mr. Charbonneau. When Mr. Potvin spoke to Mr. Mongeon, Mr. Charbonneau had left the area and, according to Mr. Potvin had gone to another part of the building. Mr. Potvin asked Mr. Mongeon if he worked for Mr. Charbonneau. Mr. Mongeon responded in the affirmative. Mr. Potvin then asked if Mr. Mongeon was a member of the applicant or any of its affiliated locals. Mr. Mongeon replied in the negative. When Mr. Potvin explained that the respondent was bound to a collective agreement which obliged him to employ union members, Mr. Mongeon advised Mr. Potvin that he would have to take that up with Mr. Charbonneau. While at the project, Mr. Potvin also spoke to an unidentified male. Mr. Potvin asked this person if he was a member of the union and received a negative response. This person also instructed Mr. Potvin to speak to Mr. Charbonneau. Thereafter this person left the premises and went outside. There is no evidence before us to indicate that Mr. Potvin saw anyone doing work normally performed by the applicant's members on that day.

10. Mr. Potvin did not in fact speak to Mr. Charbonneau on that day. Mr. Potvin testified that he attempted to seek out Mr. Charbonneau following his conversation with Mr. Mongeon but was unsuccessful. Mr. Potvin did not however speak to Mr. Charbonneau at any other time. He did not try to contact Mr. Charbonneau either at his office, in person or via telephone. Mr. Potvin

did not return to the project after December 5th. This grievance was filed with the Board on February 6, 1989 and had been delivered to the respondent on or about December 16, 1988.

11. The respondent did not make any remittances to the union for the month of November, 1988 and, pursuant to Article 9.11 of the ICI agreement, sent in a “nil” report. Pursuant to that article, a nil report is sent by an employer bound to the ICI agreement where the employer does not remit any “contributions and/or deductions” to the union because the “employer does not have any employees in his employ.” Although the respondent made certain remittances to the union for December, 1988, the respondent did not make any remittances on behalf of Mr. Mongeon or the unidentified male to whom Mr. Potvin spoke while at the project on December 5, 1988.

12. Mr. Potvin had not attended at the project prior to December 5th. Based on his experience in the industry however, he estimated that prior to his attendance on December 5th, the work that had been completed would have required approximately two persons working for five weeks for a total of 400 hours. The applicant’s measure of damages based on the principle set out in *Blouin Drywall*, [1975] 8 O.R. (2d) 103 (C.A.) is \$9,624.00.

13. In the absence of the respondent, (or perhaps more accurately in the absence of the records of the respondent) on an objective basis there would appear to be some difficulty for an applicant to acquire, and subsequently tender evidence sufficient to prove its case in grievances of this nature. It is therefore not unusual in this type of situation, that where the respondent does not attend the hearing, the applicant requests an adjournment in order to serve a *subpoena duces tecum* upon the owner or an officer of the respondent employer. In this instance, counsel indicated that the applicant wished to proceed with its case notwithstanding the absence of the respondent. Counsel referred the Board to an unreported decision of this Board in *141527 Canada Inc., carrying on business as Geracon Drywall* (Board File No. 0559-87-G, a decision released July 30, 1987) and submitted that in the past, the Board had upheld a similar grievance, based on evidence similar in nature to the evidence adduced in the case before us. The Board has reviewed the decision cited by counsel and finds that it offers little assistance to this Board. The Board in *Geracon Drywall* merely finds that, on the evidence before it, the applicant in that case proved the respondent had violated the collective agreement. That decision does not indicate the nature of the evidence tendered by the applicant. The decision merely recites, in effect, that the evidence tendered was sufficient to prove the case. In the present circumstances, we are not satisfied that the evidence establishes the violation of the collective agreement alleged by the applicant.

14. Based on the evidence, the applicant asks us to draw an inference that the acoustic, ceiling, and drywall work which had been performed at the project prior to December 5th, had been performed by the respondent and that the respondent had employed persons in contravention of the collective agreement to do that work. The applicant submits that these inferences can be drawn from the fact that in November, 1988 the respondent submitted a “nil” report. Counsel submits that on December 5, 1988, the respondent performed work at the project and did so by employing two persons who had been hired in contravention of the collective agreement. Counsel asserts that, as the respondent did not make any contributions or submit a report to the union in respect of those two individuals, an inference can be drawn that the respondent had used persons who had been hired in contravention of the collective agreement on the project for the five weeks preceding December 5, 1988. In this regard the applicant points to the credible evidence of Mr. Potvin, an experienced tradesman that, in his estimation, the work which had been performed up to December 5, 1988 would have required approximately two persons working for five weeks. To assist us in drawing this inference, counsel also points to the fact that the respondent failed to attend the hearing and failed to file a reply, thereby, in effect, indicating that there was no defence.

15. We accept Mr. Potvin's evidence in respect of the probable length of the job. The Board has in the past accepted similar evidence where the applicant union adduces credible evidence through the testimony of experienced tradesmen which the respondent is unable or unwilling to rebut. Thus, for example, in *AGIP Structural Steel Limited*, [1983] OLRB Rep. Aug. 1237, the Board accepted the evidence of two "experienced tradesmen" as to the probable length of the job notwithstanding the respondent employer's evidence regarding how much time, in fact, was spent on the job. In so doing, the Board stated

4. ... The applicant called two experienced witnesses, ... and their estimate of the job was that it would take a crew of four men a minimum of five days to complete. Apart from that, the applicant has no evidence as to when the job commenced or was completed. Mr. Ciotoli was summonsed by the applicant in the normal course to bring to the hearing all of his payroll records and other documentation which would substantiate the extent of the job, but Mr. Ciotoli produced no documentary evidence whatever in support of his own testimony.... The Board is left, therefore, with having to weigh the applicant's estimate as to how long the job could be expected to take against Mr. Ciotoli's unsubstantiated claim as to how much time in fact was spent.

5. ... On the other hand, the applicant's witnesses were experienced tradesmen, had a good opportunity to examine the job in progress, and were credible in their evidence. The normal method of verifying the number of man hours involved in the job was pursued by the union, but bore no fruit only because of the employer's failure to keep proper records. It is the view of the Board that where the union is in a position to produce, as here, credible evidence as to the approximate size of the job, and the employer has elected, for his own reasons, not to keep the proper records which could rebut that evidence, the union's estimate can be accepted.

16. The Board has also admitted hearsay evidence to establish a violation of the collective agreement where the respondent leads no evidence to contradict such hearsay evidence. (See for example, *Reimer Overhead Doors Ltd.*, [1984] OLRB Rep. Oct. 1493). In our view, however, there is a substantial difference between the Board's acceptance and reliance upon hearsay evidence, in circumstances where that is the best or only evidence available, and the conjecture or supposition of the applicant in this case.

17. On the basis of the evidence before us we are not satisfied that the applicant has established, on the balance of probabilities, that work performed on the project was work performed by the respondent. Moreover, even if we were to accept counsel's submissions that the evidence established that the work was performed by the respondent, on the evidence before us we are not satisfied that the applicant has established, on a balance of probabilities, that the work was performed by persons employed contrary to the collective agreement. In the instant case we do not have even hearsay evidence which could cause us to find as fact the assumptions made and asserted by the applicant in this case. Representatives of the applicant did not speak to, or even attempt to contact, Mr. Charbonneau, the principal of the respondent, to discuss this project prior to the filing of this grievance. Neither did any representative attempt to ascertain from *any* person on site (for example, the owner of the pharmacy or the persons to whom Mr. Potvin spoke on December 5th) such basic facts as, when the job commenced, whether the respondent had performed work on the project prior to December 5, 1988, and if so whether the persons who had performed that work were members of the applicant, or whether the persons to whom Mr. Potvin spoke worked on that site on that day or at any previous time. In our view, the applicant has failed to observe even the minimum standards which would enable it to ultimately prove the violation of the collective agreement which it alleges.

18. We do not agree with counsel's assertion that the evidence before us establishes, on a balance of probabilities that the respondent performed work at the project on December 5, 1988 and did so by employing two persons who had been hired in contravention of the collective agree-

ment. Moreover, even if we did agree with that assertion, we are not prepared to infer that, because the respondent failed to submit a report to the union in respect of those two individuals, the respondent has somehow admitted a violation of the collective agreement by sending in a "nil" report for the month of November 1988. The "nil" report is equally consistent with the inference that the respondent did not have any employees in its employ. Alternatively, a "nil" report is also consistent with the inference that the respondent did have employees in its employ *and* those persons were members of the applicant union (or another affiliated local) but the respondent merely failed to make the appropriate deductions and/or contributions to the union. Similarly, the failure of the respondent to file a reply or attend at the hearing is consistent with the respondent's right to require the applicant to prove its case. That fact does not cause us to draw an adverse inference, nor do we consider the respondent's failure to attend as an admission that it violated the collective agreement.

19. For these reasons the grievance is dismissed.

3195-88-R Teamsters Local Union 938, Applicant v. The Corporation of the City of Gloucester, Respondent v. The Association of Municipal Employees, Intervener

Certification - Pre-Hearing Vote - Trade Union - Trade Union Status -Whether application barred due to six month bar in place against another local of the same union - Pre-hearing vote ordered but ballot box sealed -Issue of trade union status of applicant to be dealt with at the hearing to be scheduled to hear the merits of entertaining the application

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

DECISION OF THE BOARD; April 21, 1989

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.

2. The employees of the respondent who are affected by this application are those presently represented by the intervener. Articles 2.01 and 2.02 of the most recent collective agreement between the respondent and the intervener describe the intervener's bargaining unit as follows:

2:01 The Employer recognizes the Association as the exclusive agent for all permanent employees covered by this agreement.

2:02 This agreement shall only apply to those permanent hourly and salaried positions of the Recreation Facilities and the Parks Divisions of the Recreation and Parks Department as listed in Appendices A & B attached hereto.

Appendices A & B list specific job positions and wage rates.

3. The unit represented by the intervener was recently the subject of a certification application in Board File 2358-88-R, in which Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 ("Local 91") was the applicant. In that application, the Board directed that a pre-hearing representation vote be taken in a voting constituency described as consisting of:

all hourly and salaried permanent employees of the Recreation Facilities and the Parks Divisions of the Recreation and Parks Department of the respondent.

Clarity Note: The employees in [the voting constituency] are those employees listed in Appendices A & B attached to the collective agreement between the Corporation of the City of Gloucester and the Association of Municipal Employees.

The vote so directed was conducted on February 13, 1989. Not more than fifty per cent of the ballots cast were in favour of Local 91. Its application was therefore dismissed on March 28, 1989, in a decision which noted that:

19. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in voting constituency #1 within the period of six months from the date hereof.

4. In accordance with its usual practice, upon receipt of this new application the Board authorized a Labour Relations Officer to examine the records of the applicant and the respondent for the purpose of obtaining the information required by the Board under subsection 9(2) of the Act and to meet with representatives of the applicant, respondent and intervener ("the participants") to ascertain and discuss their positions on the merits of the application and with respect to the conduct of any pre-hearing representation vote and report thereon to the Board.

5. In the course of her review with the participants of the issues in this application, the Labour Relations Officer noted that, from a check of the Board's status records, it appeared that the Board had not found in any previous proceeding that an organization by the name of "Teamsters Local Union 938" was a trade union within the meaning of clause 1(1)(p) of the Labour Relations Act, although there had been a finding in Board File No. 11961-66-R that "Teamsters, Local 938" was a trade union within the meaning of the Act. The respondent's position with respect to this information was that the applicant would have to prove its "status". It also took the position that the geographic scope of the applicant's charter does not extend to the employees in question; if the geographic scope of the applicant's charter does extend to the subject employees then, the respondent argues, the six months bar imposed on Local 91 in Board File 2358-88-R should apply to the applicant in this application. The intervener takes the position that the applicant and Local 91 are one and the same organization so that the bar to applications by Local 91 applies to this applicant.

6. The applicant takes the position that it and Local 91 are separate and distinct organizations and that the bar imposed on Local 91 should not apply to it. It advised the officer that it would send a letter to the Board setting out its position with respect to the "status" issue. The Registrar has since received a letter dated April 18, 1989 from counsel for the applicant, which contains the following assertions:

This is to confirm that the correct name of the Applicant is "Teamsters Local Union 938", as set out in Section 1 of the Applicant's by-laws (copy enclosed).

Also enclosed for your reference is a copy of the Applicant's charter from the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as amended, which indicates a province-wide jurisdiction for, *inter alia*, "miscellaneous workers". The Applicant submits that, in any case, the geographic scope of the charter is irrelevant.

The Applicant has been certified by the Board on many occasions in the past and is the same organization named in certificates of status as: "Teamsters, Local 938"; "General Truck Drivers

Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America"; and "Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America", in Board File Nos. 11961-66-R, 3073-72-R and 2290-87-R.

Unless the Respondent or the Intervener alleges to the contrary, that is, unless it is alleged that the Applicant is *not* the same said organization, the Board should follow its past practice and recognize the status of the Applicant pursuant to Section 105 of the Act.

7. Section 105 of the Act provides:

105. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

The Board does not grant an applicant certification without making a finding that it is a trade union within the meaning of clause 1(1)(p) of the Act. The question whether an applicant is a trade union is a question of fact. By virtue of section 105 of the Act, that question may be answered in the affirmative if the Board is satisfied that the applicant is an organization in respect of which an affirmative finding was made in a previous application. The degree of similarity or difference between the name under which an applicant applies and the name under which an organization was previously found to be a trade union may affect the Board's willingness to assume that the two are the same in the absence of any assertion to the contrary but, in the end, all an applicant need do is satisfy the Board that it is one of the organizations which the Board has previously found to be a trade union. It may not be particularly difficult for this applicant to "prove its status", as the respondent insists it must, when this application is dealt with at hearing.

8. At this stage, however, we are called upon to deal only with the matters referred to in subsections (2) and (3) of section 9 of the Act and not with the merits of the application for certification. As the Board stated in *Taiga Trucking (Ontario) 1980 Inc.*, [1987] OLRB Rep. Nov. 1433:

5. Our function at this stage is to make the determinations contemplated by subsection 9(2) of the Act. We do not determine the appropriate bargaining unit or assess the weight to be given to the applicant's membership evidence. As appears from subsection 9(4) of the Act, those matters are only decided after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any issue affecting the certification application or the pre-hearing representation vote. Indeed, *at this stage the Board does not attempt to resolve any dispute about its constitutional jurisdiction (Kenting Earth Sciences Limited, [1985] OLRB Rep. Feb. 293) or the applicant's "trade union status" (Emery Industries Limited, supra) or the identity of persons employed in any proposed bargaining unit at any relevant time (The Board of Education for the City of North York, [1984] OLRB Rep. July 989), or the application of subsection 1(4) of the Act (Satin Finish Hardwood Flooring (Ontario) Limited), [1984] OLRB Rep. Nov. 1602). These and any other issues affecting whether and how the results of a pre-hearing vote should affect the disposition of the application for certification are only resolved after any such vote is conducted.*

[emphasis added]

9. Having regard to the provisions of what is now section 9 of the Act, the Board in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316 concluded that the question of the "status" of an applicant as a "trade union" is one of those questions with which the legislature intended the Board should deal at the hearing contemplated by subsection 9 (4), after any pre-hearing representation vote had been conducted. As the Board said in paragraph 11 of that decision:

There is no reason for according the "status issue" a special significance which removes it from

the ambit of a legislative scheme which specifically provides for a resolution of disputed issues after a vote is taken.

The same may be said of a dispute about whether an exercise of the Board's jurisdiction under 103(2)(i) of the Act should result in the dismissal of an application brought by a previously unsuccessful applicant or by a trade union seeking to represent employees who were affected by a previously unsuccessful application. Where the propriety of the Board's entertaining a subsequent application on its merits is put in issue, the Board will nevertheless direct the taking of a pre-hearing representation vote if the prerequisites defined in subsection 9(2) of the Act have been met, but will also ordinarily exercise its jurisdiction under subsection 9(3) to seal the ballot box pending determination of that dispute: *U-Need-A Cab Limited*, [1989] OLRB Rep. Mar. 301; and see *The Board of Education for the City of Toronto*, [1985] OLRB Rep. July 1180.

10. We determine that the voting constituency for the purpose of any pre-hearing representation vote in this matter should be the voting constituency described in the Board's decision of February 3, 1989 in Board File No. 2358-88-R, which we have quoted in paragraph 3 of this decision.

11. It appears to us on an examination of the records of the applicant and the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made.

12. Accordingly, we direct the taking of a pre-hearing representation vote. All those employed in the voting constituency on April 11, 1989 who are so employed on the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent. As the propriety of the Board's entertaining this application on its merits has been put in question, the ballot box shall be sealed and the ballots cast shall not be counted (except on agreement of the applicant, respondent and intervener) pending determination of that question.

13. The matter is referred to the Registrar.

2963-88-R United Steelworkers of America, Applicant v. **Goldcrest Furniture Ltd.**, Respondent v. Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervener #1 v. Group of Employees, Intervener #2

Certification - Pre-Hearing Vote - Timeliness - Respondent and intervener arguing that pre-hearing vote should not be ordered because the application was untimely - Applicant asking that Board set aside earlier decision giving consent to early termination of collective agreement due to lack of notice to employees and fraud - Collective agreement would not bar application if Board retroactively revokes its consent to the early termination - Vote ordered - Ballot box sealed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *C. McDonald*.

DECISION OF THE BOARD; April 3, 1989

1. This is an application for certification in which the applicant has requested that a pre-hearing vote be taken. The respondent and intervener contend the Board should not do so because, they say, this application is "patently" untimely.

2. It appears to be common ground that the employees affected by this application were covered by a collective agreement between the respondent and intervener which, by its terms, was effective from April 1, 1986 to March 31, 1989 ("the 1986 agreement"). It also appears to be common ground that there exists a subsequent document purporting to be a collective agreement between the respondent and intervener covering the same employees. According to its terms, this second document is effective from April 1, 1988 until March 31, 1991. If the 1986 agreement was in effect on the application date, this application would be timely under subsection 5(4) of the Act. If the agreement set out in the second document is treated as having been in effect on the application date, as the respondent and intervener claim it should, then this application would be untimely.

3. There can only be one collective agreement in effect with respect to any particular bargaining unit at any one time. Subsection 52(3) of the Act provides that a collective agreement shall not be terminated by the parties to it before it ceases to operate in accordance with its provisions without the consent of the Board on the joint application of the parties. The Board's concern on such applications is that no one be deprived of a fair opportunity to attack the incumbent's bargaining rights during the usual open periods of the collective agreement which the parties seek to terminate. It therefore requires that notice of the application be given to employees in the affected bargaining unit by means of a posting in the workplace; if any affected employee or trade union objects to the foreclosure of the open period, the Board usually consents to the termination of the agreement only after the expiry of a period of two months. (See Sack and Mitchell, *Ontario Labour Relations Board Law and Practice* (1985) 553.)

4. The respondent and intervener say the agreement set out in the second document was made on September 1, 1988, after the Board had granted its consent to the early termination of the 1986 agreement in a decision dated August 15, 1988. That decision would have been made on the strength of a representation that notices of the joint application had been posted in the workplace for five days in such conspicuous locations that they would most likely have come to the attention of the employees concerned.

5. The applicant says it conducted an organizing campaign in the workplace in December 1987 and had since then been awaiting the open period of the 1986 agreement. The respondent and intervener would, it claims, have been aware of its campaign. It says neither it nor bargaining unit employees received notice of the joint application for early termination of the 1986 agreement. It alleges that a proper posting did not take place, and that the contrary assertion on which the Board acted in granting its consent constituted a fraud on the Board. The applicant and certain employees have asked that the Board reconsider and set aside the decision of August 15, 1988 because of the alleged lack of notice and fraud.

6. If the facts asserted by the applicant are true, the Board might retroactively revoke its consent to the early termination of the 1986. In that event, the subsequent document would not be a bar to this application. The respondent and intervener argue that the consent granted by the Board's decision of August 15, 1988 should be treated as effective unless and until it is varied or revoked. They say that in these circumstances there should be no representation vote conducted in connection with this application until the applicant has established at a hearing that its application is timely.

7. Section 9 of the *Labour Relations Act* ("the Act") provides for the taking of pre-hearing representation votes:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

8. At this stage, we are called upon to deal only with the matters referred to in subsections (2) and (3) of section 9 and not with the merits of the application. As the Board stated in *Taiga Trucking (Ontario) 1980 Inc.*, [1987] OLRB Rep. Nov. 1433:

5. Our function at this stage is to make the determinations contemplated by subsection 9(2) of the Act. We do not determine the appropriate bargaining unit or assess the weight to be given to the applicant's membership evidence. As appears from subsection 9(4) of the Act, those matters are only decided after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any issue affecting the certification application or the pre-hearing representation vote. Indeed, at this stage the Board does not attempt to resolve any dispute about its constitutional jurisdiction (*Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293) or the applicant's "trade union status" (*Emery Industries Limited, supra*) or the identity of persons employed in any proposed bargaining unit at any relevant time (*The Board of Education for the City of North York*, [1984] OLRB Rep. July 989), or the application of subsection 1(4) of the Act (*Satin Finish Hardwood Flooring (Ontario) Limited*), [1984] OLRB Rep. Nov. 1602). These and any other issues affecting whether and how the results of a pre-hearing vote should affect the disposition of the application for certification are only resolved *after* any such vote is conducted.

9. Without prejudice to their position on the timeliness of this application, the respondent and intervener agree with the applicant that the appropriate bargaining unit of employees of the respondent for the purpose of this application, and the voting constituency for the purpose of any pre-hearing representation vote, should consist of

all employees of the respondent in its furniture division in the Municipality of Metropolitan Toronto and the Town of Concord save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

We determine that the voting constituency for the purpose of any pre-hearing representation vote shall be as the applicant, respondent and intervener have agreed. From an examination of the records of the trade union and the records of the employer it appears that not less than thirty-five per cent of the employees in the voting constituency were members of the applicant trade union at the time that this application was made.

10. The prerequisites prescribed by subsection 9(2) having thus been met, we undoubtedly

have the jurisdiction to direct that a pre-hearing representation vote be conducted, and a discretion whether to do so or not. The respondent and intervener contend that we should not do so because of the "patent" untimeliness of the application and the disruption which would be caused by conducting a vote in these circumstances.

11. Once a trade union has attained support in a workplace, any delay in assessing that support for the purpose of a certification application works to the prejudice of the union: employees lose interest when the collective bargaining process does not begin soon after they commit to union membership. The prejudicial effect of the delay involved in determining issues put in dispute by other parties is one of the reasons trade unions prefer membership evidence to post-hearing representation votes as the means of assessing employee support in certification applications. For their part, employers and those who represent their interests argue that membership evidence is an unreliable basis for the certification decision, which they say should be based on a representation vote in every case. Employers are often incredulous that a majority of their employees wish to be represented by a trade union. It is argued on their behalf that collective bargaining will be more fruitful if that incredulity is first overcome by credible demonstration of employee support by means of a representation vote.

12. Whether certification decisions should be based on membership evidence or on the results of a representation vote is a matter of perennial debate: see Weiler, *Reconcilable Differences* (1980) at pages 37 to 49; Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under The NLRA*, 96 Harv. L. Rev. 1769 (1983). The response to this debate in some jurisdictions has been to require representation votes in every case but conduct them as soon as possible after the application is filed, before hearing the application on the merits; see Christie, *Certification: Is There A Better Way To Test Employee Wishes?*, in *The Direction of Labour Policy in Canada* 47 (F. Bairstow ed. 1977). That has not been the response in Ontario. Membership evidence is the primary basis on which certification applications are determined in "ordinary" applications under section 7 of the *Labour Relations Act*. The section 9 "quick vote" is, however, an option which a trade union can request when it applies for certification. If certifications based on representation votes are more palatable to employers and from their perspective provide a better foundation for collective bargaining than those based on membership evidence, then it is obviously in the interests of harmonious labour relations that the quick vote option be exercised as often as possible. Trade unions will be reluctant to exercise that option if the processing of the application through to and including the conduct of the vote can be delayed by an opposing party's raising an argument which, if successful, would result in the dismissal of the application.

13. The Board remarked in *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589 that

3. A quick vote will be a totally illusive ideal except in the most trivially simple of cases if the trade union status of the applicant, the description or composition of the appropriate bargaining unit, the list of persons employed in that unit on the application date, the qualitative and quantitative sufficiency of evidence of membership or any other issue of substance must be adjudicated before the vote is conducted. The provisions of section 9 recognize this. By describing the vote contemplated by section 9 as a "pre-hearing" vote, the Legislature recognized that the Board must be able to decide whether to conduct such a vote without having first to decide any issue in respect of which any person has the right to prior notice and the opportunity of a hearing. As the Board observed in *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 292 at paragraph 8:

... A "pre-hearing representation vote" is precisely that: a vote conducted before any hearing is held to determine whether and to what extent the result of that vote should affect the rights of the parties. The Board has repeatedly noted that the expedition contemplated and intended by section 9 of the *Labour Relations Act* would be lost if the vote had to await formal adjudication of some contested issue in the guise of a

preliminary matter: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989; *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602, and the decisions cited therein. A hearing is conducted after the vote to determine whether effect should be given to the result.

4. The Board's response under subsection 9(2) to a request that a pre-hearing vote be conducted involves a decision about procedure, not substance. The procedural question is whether to gather up additional information about the wishes of employees to be represented by the applicant. The employees whose wishes would be tested in this way collectively constitute one or more voting constituencies, which may very well not be coextensive with the bargaining unit or units ultimately found appropriate by the board. The voting procedure can be designed to ensure that a vote of employees in that bargaining unit or units can, in effect, be retrospectively reconstructed from ballots cast by persons in the voting constituency or constituencies. The Board's discretion in defining a voting constituency is fettered only by its own assessment of the possible utility of a pre-hearing vote conducted in that constituency. If it appears to the Board that not less than 35 per cent of the employees in a voting constituency were members of the applicant at the time the application was made, the Board may conduct such a vote *before* entertaining the representations and evidence of the parties and other interested persons with respect to matters relevant to the disposition of the application and *before* determining whether and to what extent the results of that vote could or should be relied upon in dealing with the application.

5. Except in very simple cases, there will always be some risk that no use can ultimately be made of the results of a particular pre-hearing representation vote. Against that risk must be balanced the potential benefit of the quick vote, both in the case at hand and for the certification process generally. In the Board's view, the purpose described in the preamble to the Act is best served by making the section 9 quick vote procedure a real and workable option in the widest possible range of cases. *As a matter of policy, the Board will not be quick to conclude that a pre-hearing vote should not be conducted because of a risk, however real, that no use could ultimately be made of the results. Generally, the Board would rather conduct a pre-hearing vote which might later prove useless than fail to conduct a pre-hearing vote which might have been useful.*

[emphasis added]

We reaffirm the views expressed in this passage, including particularly the emphasized portion. One of the necessary consequences of acting on those views is that employers, employees and trade union will occasionally suffer the inconvenience and disruption of votes which later prove useless.

14. The conduct of a pre-hearing representation vote will generally be directed, even though effect could not be given to it if the facts alleged by other parties later prove to be correct, so long as effect could be given to it if the factual allegations of the applicant prove to be correct. When there are issues in dispute which govern whether effect may be given to the results of the vote, the ballot box is sealed and the ballots not counted pending the post-vote determination of those issues. The Board's willingness to follow this course does not depend, as the intervener submits it should, on there being some effective sanction which can be imposed on the applicant should it later be shown that its assertions were made frivolously and vexatiously. With respect to the decision in *Ontario Hydro*, [1980] OLRB Rep. June 882, cited by counsel for the respondent and intervener in their filings, we adopt the view expressed in *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589 at paragraph 14:

14. In our view, the significant feature in the application dealt with by the 1980 *Hydro* decision was that the applicant did not have the requisite appearance of support in any unit which the Board felt would have any substantial prospect of later being found appropriate *even if the applicant's allegations of fact were all true*. That was not a case in which the effectiveness of the vote would have depended simply on the applicant union's view of the facts prevailing over the view of those who opposed the application. Even on the applicant's view of the facts, there was no substantial likelihood that effect would be given to any vote which might be conducted.

15. In this case effect might be given to the results of a pre-hearing representation vote if the Board accepts and acts on the applicant's assertion that there was not adequate notice of the application which led to the decision granting consent to the early termination of the 1986 agreement. Accordingly, we direct that a pre-hearing representation vote be conducted among employees in the voting constituency described in paragraph 9 hereof. All those employed in that voting constituency on March 10, 1989 who are so employed on the date the vote is conducted will be eligible to vote. Voters shall be asked whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent. The ballot box shall be sealed and none of the ballots cast therein shall be counted pending determination of the timeliness of this application.

16. All other matters concerning the conduct of the pre-hearing representation vote are referred to the Registrar under section 68 of the Board's Rules of Procedure.

1965-88-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant v. Melnor Manufacturing Ltd., Respondent.

Union Successor Status - Shop union changing its constitution to permit it to merge with another union and then voting to merge with the CAW - Board asked to consider dicta in *Astgen v. Smith* requiring unanimous consent to change constitution - Respondent arguing that the fundamental objects of a union cannot be amended by a majority - Board analyzing case and concluding that it was not entirely appropriate to considerations under s.62 - Board issuing declaration

BEFORE: Paula Knopf, Vice-Chair, and Board Members W. H. Wightman and P. V. Grasso.

APPEARANCES: Sheila Cuthbertson and Jane Armstrong for the applicant; W. J. Hayter, Andy Szalai and Teresa Savage for the respondent.

DECISION OF THE BOARD; April 20, 1989

1. This is an application under section 62 of the *Labour Relations Act* for a declaration that the applicant (also referred to as the CAW) is the successor of the rights, privileges and duties of the Melnor Manufacturing Ltd. (Brantford) Shop Union (also referred to as the Shop Union) by reason of a merger, amalgamation or transfer of jurisdiction.

2. At the opening proceedings, counsel for the employer indicated that the respondent was not taking issue with the facts set forth in the application. Therefore, the Union's facts set out in the application have been accepted as true by this Board. These facts are as follows. The constitution of the Shop Union contains the following provision:

Article 10 - Amendments

These by-laws may be amended by the affirmative vote of not less than two-thirds (2/3) of the members present at any special membership meeting called for that purpose.

The Executive of the Shop Union called a "special meeting" of the employees in the bargaining unit of the Shop Union to consider and vote on a motion to amend the Shop Union's constitution

to permit it to “merge” with another trade union. Further, the meeting was to consider and vote upon a motion to provide that the Shop Union “merge” with the CAW and thereby dissolve the Shop Union’s separate existence. A notice of a special meeting of the Shop Union to be held on Sunday, October 16, 1988 at a specified location was mailed to each of the members of the Shop Union by prepaid post on or before Thursday, October 6, 1988. The mailing contained:

- (1) A notice of special meeting;
- (2) a letter to the employees in the unit of the Shop Union signed by its President and Vice-President indicating that the Union Executive had decided that it would “be in the best interest of the employees to merge with CAW-Canada ... to secure a better future for the employees at Melnor Manufacturing Ltd.”;
- (3) a copy of the text of the motion to amend the constitution to permit it to merge, amalgamate with and/or transfer its jurisdiction to any other trade union by a majority vote of those present and voting on the motion; and
- (4) a copy of the text of the motion to merge and amalgamate with and transfer its jurisdiction to the CAW and thereby dissolve its separate existence.

The Shop Union also later distributed a reminder of the special meeting. Thereafter, the special meeting was held on October 16, 1988 at the Brantford Park Inn in Brantford. Fifty persons who were members of the Shop Union were in attendance at the meeting. The motion to amend the constitution to permit merger and the motion and effect of the merger with the CAW were presented and discussed. Voting on these motions was taken by secret ballot.

3. The vote to amend the constitution to permit the Shop Union to merge, amalgamate and transfer its jurisdiction and thereby dissolve itself was passed with thirty-nine approving the motion and eleven opposing the motion. The motion seeking approval of the merger, amalgamation and transfer of jurisdiction of the Shop Union with the CAW and the dissolution of the Shop Union was then passed, with forty-six approving the motion and four opposing it.

4. The following day, on October 17, 1988, the CAW contacted the respondent by telex, to the attention of the Plant Manager, advising the respondent of the merger and suggesting that the parties meet. The National Representative of the CAW sent a follow-up letter on October 25, 1988, again suggesting that the parties meet.

5. By notice dated October 27, 1988, all members of the Shop Union were welcomed into the CAW by its President Robert White and informed that they were now members of the CAW, Local 397.

6. On November 1, 1988 the CAW received a letter dated November 1, 1988 from the Director of Operations of the respondent indicating that the respondent required verification of the CAW’s status as the bargaining agent and declining to meet with the CAW or to transact any business until verification of the CAW status as a bargaining agent had been accomplished. Thereafter, the applicant filed this application for a declaration concerning status of the successor trade union.

7. After having accepted these facts, counsel for the employer asked the Union if it was

willing to supply the Board with information surrounding the present status of the Shop Union. Counsel for the CAW replied to this request with the information that the predecessor had simply dissolved once the vote was taken. But in any event the position was taken that its status was of no interest to the respondent or the Board and thus the CAW chose not to present any other evidence on the issue.

The Argument

8. Upon this context, counsel for the CAW argued that a satisfactory basis had been established for the Board to make a declaration under section 62 that the CAW was the successor of the Melnor Shop Union. Counsel outlined how the predecessor had called a special meeting to amend the constitution to allow for merger and then to vote upon the merger itself by giving full and adequate notice to all the affected employees. The two votes were passed by a large majority. Thus, the CAW argues that the methods and procedures adopted here conform with the Board's many cases that have granted declarations of successorship where the merger is contemplated by a union constitution, even if it was recently amended to allow such action. The Board was referred specifically to the cases of *Peerless Plastics Limited*, [1978] OLRB Rep. Sept. 848; *Zehrs Markets Division of Zehrmart Limited*, [1977] OLRB Rep. Oct. 637 and *I.B.L. Industries Limited*, [1987] OLRB Rep. Sept. 1144.

9. Counsel for the employer urged the Board to take a close look at its own jurisprudence in this area and ask itself if it has correctly interpreted and applied the dicta on mergers contained in the Ontario Court of Appeals' decision in *Astgen v. Smith*, (1969) 7 D.L.R. 3 657. Counsel for the respondent argued that a proper reading of that case dictates that we must conclude, as a matter of law, that no merger took place in the facts at hand.

10. The respondent's first argument was that the union has no power to amend its constitution to provide for any mechanism for merger. We were reminded that the original constitution was silent on the question of merger. Article 10 which is quoted above only empowers the union to amend its "by-laws." We were told that the evidence only revealed the existence of a constitution, but did not reveal any separate by-laws. It was argued that while the constitution allows by-laws to be amended by a two-thirds vote, since there were no by-laws to amend and no power to amend the constitution itself, it was said that any attempt to amend the constitution would therefore be without force and effect.

11. The respondent's second and main argument was based on the decision in *Astgen v. Smith, supra*. It was said that that case must be read to establish that any amending formula under a constitution is insufficient to support an amendment which changes the fundamental objects of the association unless unanimous consent is attained. Similarly, if the constitution is silent on the question of merger, it was argued that the only way it can be dealt with is by the unanimous consent of its members. Further, it was said that even a change in the constitution to add the power to merge in the future should be considered a fundamental change requiring unanimous votes. Hence, it was argued that the union could not avoid the requirement of unanimous consent.

12. Finally, the respondent argued that the Board must be presented with evidence regarding the current status of the predecessor union before we should exercise our discretion under section 62. It was said that we need evidence to satisfy ourselves about the substantial completion of the merger before we should issue a declaration under section 62. We were referred to *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252 at paragraph 39, *Peerless Plastics Limited, supra*, and *Corporation of the City of Brockville*, Board File 1402-78-R, paragraph 16.

13. In response to these submissions, the Union offered at that stage to present evidence on

the question of the Shop Union's status. But the respondent took the position that the Union had been alerted to the issue at the outset of the proceedings and had chosen not to call evidence. Thus, the respondent argued that it ought to be considered too late for the Union to try to do so at this stage of the proceedings.

The Decision

14. Let us begin by dealing with the respondent's secondary arguments on the issue of the constitutional power to amend and the lack of factual evidence about the present status of the Shop Union.

15. First of all, the original Melnor Shop Union constitution contained an amendment clause in Article 10 providing for the amendment of "these by-laws". It is true that the Article only refers to the amendment of by-laws and that there are no indications in the evidence of anything entitled "By-laws." It is also true that by-laws are often separate concepts from a constitution and amount to the ancillary mechanisms necessary to implement the fundamental powers conferred in a constitution. However, a full reading of the Melnor Shop Union constitution discloses that the document itself contemplates that its own provisions or articles ought to be considered as its own by-laws. Article 9(a) of the constitution refers to "the constitution or *these* by-laws" [emphasis added] indicating that the document considers the very terms of the constitution to be its by-laws. The document, read as a whole, seems to discuss the totality of the document in terms of a constitution but considers its individual terms or articles as "its" or "these by-laws." Thus, we do not agree that the amending formula in Article 10 is confined to amendment of non-existent and separate by-laws. Instead, Article 10 confers on the members of the union the power to amend both the individual and global terms of the constitution filed before us.

16. We shall now address the question of whether the Board has sufficient evidence on the present status of the predecessor union to exercise our discretion under section 62. We agree that our declaratory powers under section 62 should only be exercised where we are satisfied that there was substantial completion of the merger. But here we have evidence that the members of the predecessor union voted to merge with the CAW and thereby dissolve itself. Thereafter, we have evidence of the CAW communicating its merger to the employer by way of a telex on October 17th and that a copy of this telex was sent to the President of the former Shop Union, Liviana Macaretta. Follow-up correspondence was sent to the company on October 25th by the CAW and also copied to Ms. Macaretta. Notice of the merger was also given to all members of the Shop Union. No affected employee has disputed the purported merger or is challenging this request for the declaration of successorship. There is no evidence or allegation that the Shop Union has done anything other than dissolve. At the very least, the evidence is sufficient to show that the Shop Union has transferred its jurisdiction to the CAW and the CAW has accepted the responsibility to represent the members in collective bargaining.

17. This brings us to the main thrust of the dispute in this case as to whether, as a matter of law, a merger has taken place. Counsel for the respondent conceded at the outset of his argument that he faced an uphill battle with the Board because the respondent's position contradicts years of authorities issued by this Board where procedures such as those adopted by the applicants here have been routinely declared appropriate and valid by the Board. Not surprisingly, counsel for the Union asked the Board rhetorically how we could or would entertain the notion of declaring a decade of jurisprudence inappropriate.

18. Let us start by assuring the parties and the community we serve that we must and shall look carefully and openly upon each argument presented to us. If we can be persuaded that an established trend of cases is incorrect or no longer appropriate, then we are prepared to change the

direction of those cases. But this will not be done lightly or unless it has been clearly demonstrated that such a course is appropriate. In the situation at hand, we were presented with able and creative arguments by Mr. Hayter and they deserve careful reflection.

19. Let us now deal with the respondent's primary argument dealing with the application of *Astgen v. Smith* to this fact situation. In *Astgen v. Smith*, a merger agreement was made between the International Union of Mine, Mill and the United Steelworkers of America. The Court of Appeal was asked to consider the making of a declaratory judgement on the validity of the merger. The Court of Appeal told itself that in order to determine the validity of the purported merger, two questions must be answered at the outset. First, was the action taken by Mine, Mill and Smelter Workers in concluding an agreement to merge with Steelworkers *intra vires* Mine, Mill? Secondly, if the action was *intra vires*, were the proper procedural steps taken to bring about such a merger? The Court reviewed the constitutions of both the unions carefully, the legal status of a trade union and the legal relationship between the members in each union. On the facts of *Astgen v. Smith*, the Court considered how Mine Mill had attempted to amend its constitution which had been silent on the ability to merge. There, the Executive Board had attempted to act with the approval of a majority vote on a referendum. The Court considered the importance of such an issue beyond the power of the Executive Board. The Court also noted that "the difference in the constitutions of the two unions is too fundamental to be glossed over." Thus, the Court concluded that the proposed merger was ineffective and void.

20. The principle which emerges strongly from *Astgen v. Smith*, and which the respondent argues that this Board has forgotten over the years, is that the fundamental objects of the union cannot be amended by a majority. Instead, unanimous consent is required. The respondent's argument is based on the concept that the principles in *Astgen v. Smith* demand that a union cannot dissolve itself without having initially given itself the power to do so in its constitution or without later obtaining the unanimous consent of its members.

21. But does that mean that every union which has a constitution which is silent on the specific question of merger cannot initiate a merger or amalgamation process without the unanimous approval of its membership? The Board has not required that since the release of *Astgen v. Smith*. Indeed, we have demanded unanimity only in the absence of constitutional provisions in the predecessor trade union regarding merger, amalgamation or transfer. Further, we have made successor declarations under section 62 where unions have amended constitutions to provide for mergers on the strength of a majority vote. Therefore we must look closely at the *Astgen v. Smith* case. That case was concerned with the property rights which resulted after certain actions were taken by and between two unions. Two members of the local Mine, Mill & Smelter Union were challenging a process by which the local union had purported to merge with the United Steelworkers. The Court of Appeal dealt with whether the merger was *intra vires* the constitution of the local union and whether the merger was binding. In reviewing the acts which led to the attempt to merge, the Court of Appeal discovered that the local constitution did not contemplate or provide for any procedure for merger. The executive of the union then set up a process to try to bring about the merger which the Court of Appeal viewed to be entirely outside of the executive authority and *ultra vires* the constitution of the organization. On that basis alone, the Court was able to conclude that the purported merger was of no effect. These facts are quite distinct from the facts in the case at hand and do not form the basis of the part of the case which the respondent relies upon here.

22. The aspects of the *Astgen v. Smith* decision that the respondent relies upon deal with the discussion concerning the status of a trade union and the relationship between its members *inter se*. The Court reviewed the well-established body of "club law" which governs the relationship and "contract of association" between members of voluntary organizations and trade unions.

The Court acknowledged that trade unions have a “somewhat different” status than an athletic club (at page 661). But essentially the analysis treats the distinctions as being without a difference and of no relevance to the question before the Court. Insofar as that analysis is concerned, we respectfully must point out that the analysis in the decision is *obiter dicta* and that it would be inappropriate to apply it to this Board’s considerations under section 62 of the Act.

23. It must be stressed that this Board is being asked to make a declaration under section 62 of the Act. The Court in *Astgen v. Smith* was not making its considerations under the *Labour Relations Act* at all. Under section 62, we must turn our minds to whether the appropriate situation has been presented for us to declare that one union has become the successor of another. In doing so, we are dealing with the transfer and acquisition of all the rights, privileges and duties conferred to a union under the Act and that may also exist in a collective bargaining relationship. This is fully canvassed in the Board’s earlier decision of *Waterloo Spinning Mills Ltd.*, [1984] OLRB Rep. Mar. 542, paragraphs 33-38:

33. At common law (i.e., before the passage of modern labour legislation some forty years ago), a trade union was merely a voluntary association of employees, like a club, acting collectively in pursuit of their common interests and without any statutory framework or underpinnings. Indeed, for a time, trade unions and their activities attracted common law sanctions because such collective action amounted to a civil conspiracy in restraint of trade. However, to determine whether one trade union has acquired the *statutory* rights and obligations of another - that is, to determine the application of section 62 of the Act - one cannot ignore the statutory framework or forget that unions no longer operate (as they once did) in a legislative vacuum. Trade unions, like clubs, may well be able to exist without direct reference to the *Labour Relations Act*, but the fact is that if a trade union is to do what by statute it must do to preserve its status as a union under the Act, it must conform to statutory norms.

34. A modern trade union is very different from a typical club. It is concerned primarily with the acquisition and exercise of statutory bargaining rights. What club or mere voluntary association has the exclusive statutory right to determine its members’ terms and conditions of employment - regardless of what those members might think from time to time? What voluntary association in pursuit of its constitutional objectives has the right to act on behalf of and fundamentally affect the rights of persons who are *not* its members and who may never have voluntarily subscribed to those objectives? What club has a statutory obligation to fairly represent *non-members*, where necessary, expanding *membership* funds to do so? What club can compel the payment of membership fees from members and non-members alike? How realistic is it to treat a trade union as a “voluntary” association when the reality is that membership may be made a compulsory condition of employment? In the present case, membership in the Association has been made a condition of employment for a number of employees. The fact is that while at common law a trade union may still be only a voluntary association, under the *Labour Relations Act* it is much more than that, and when considering the acquisition, exercise or transfer of rights rooted in the statute, one cannot ignore either the practical or legal differences. Likewise, in trying to ascertain a union’s essential objects (in an *Astgen v. Smith* sense) we think the statute provides a guideline - at least in the absence of explicit conditions in the union’s own constitution.

35. The *Labour Relations Act* defines “trade union” as an “organization of employees formed for purposes that include the regulation or relations between employees and employers and includes a provincial, national or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency” (see section 1(1)(p) of the Act). The Act does not distinguish between trade unions on the basis of national or international affiliation. For the purposes of the statute it does not matter. It is not even significant, let alone fundamental. Nor is there any requirement, for example, for internal union democracy (see the decision of the Court of Appeal in *C.S.A.O. National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.* (1972) 26 D.L.R. (3d) 63). Again, for the purpose of the statute, it does not matter. What *does* matter is that the organization be composed of employees and have, among its objects, the regulation of relations between employees and employers. That is what defines the “essence” of a trade union under the Act and distinguishes it from athletic clubs,

debating societies, ethnic organizations, political parties, or other voluntary associations. It is the collective bargaining purpose that is the critical requirement. Anything else is ancillary or superfluous. Conversely, an organization which does not have as its object collective bargaining, cannot be a trade union capable of acquiring rights or responsibilities under the *Labour Relations Act*.

36. This is not to say, of course, that the constitution of a trade union is irrelevant to the Board. It is obviously an important document and in particular cases or contexts, its terms may be decisive. But it does not have the central role which it plays at common law in resolving disputes among the members over the use or distinction of assets, eligibility for office, the conduct of elections, the pursuit of the organization's objectives, and so on. That is evident from the terms of the statute itself. For example, for some statutory purposes, an individual can be a member of a trade union *regardless* of the eligibility requirements of its charter, constitution, or bylaws upon merely making application for membership and paying one dollar (see section 1(1)(j)). That is the effect of section 103(4) of the Act, and it is interesting to note that it specifically reverses a Supreme Court of Canada decision to the contrary (see *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796 et al.* (1970), 11 D.L.R. (3d) 336). Even section 62 does not expressly require that the purported merger, etc. must, or need only be in accordance with the constitution - although that is the interpretation which the Board has generally given it. The provision for taking representation votes suggests that the Board may require additional confirmatory evidence even if all of the constitutional proprieties have been observed. Conversely, it might be argued that a Board supervised vote could cure any constitutional irregularities.

37. We think the starting point in any consideration of the application of section 62 should be the trade union itself: how its objects have actually been framed in constitution, and how it has actually operated in purported furtherance of those objects. In the absence of compelling evidence, we do not think the Board would be warranted in reading into the constitution either purposes or restrictions which are not there, nor if there is no distinction in the document itself between objects which are "fundamental" and those which are merely ancillary, do we think it appropriate for this Board to second-guess the intentions of the founding members - particularly since, in all likelihood, no one ever really considered the matter, just as no one paid any attention when the Association expanded its membership base beyond those limits which the constitution contemplates. The lack of a merger or affiliation provision is not an indication of some essential but unstated premise about the fundamental nature or destiny of the Association. More likely, it results from a lack of sophistication or simply oversight.

38. We might observe at this point that we do not think anything turns on the fact that the transaction with the UFCW was framed as a merger rather than a transfer of bargaining jurisdiction. Although the merger permits the employers to now claim that the "very existence" of the Association was at stake, that argument is a little artificial. Suppose, for example, that the Association had merely purported to transfer to the UFCW bargaining jurisdiction for the employees it represents, while preserving its separate existence, officers, assets, members, and so on. Would this change in the form of the transaction make any difference? We do not think so. The Association would be a hollow shell, a form without function, an organization with a continued common law existence but unable any longer to bargain with the employer in pursuit of the objective expressly stipulated in its constitution. If a merger is a fundamental change in the nature of the organization, a transfer of jurisdiction must be too.

24. Several important principles emerge from the *Waterloo Spinning Mills Ltd.* case. First, in exercising our jurisdiction under section 62, we are concerned with the acquisition, exercise and transfer of all collective bargaining rights. Secondly, the "essence" of a trade union under the Act is that it is an organization of employees which has, among its objects, the regulation of relations between employees and employers through collective bargaining. All other objects are "ancillary or superfluous". Thus, the object of regulating relations between employees and employers is the "essential object" of a trade union that *Astgen v. Smith* is concerned about. We recognize that the *Astgen v. Smith* decision deals in *obiter dicta* and criticizes the purported merger because it would have merged two organizations with what the Court considered to be fundamentally different objects because one union was considered national and the other was considered to be interna-

tional. But the Court failed to recognize that the two organizations shared the same fundamental objects of being a trade union and existed to regulate the relations between the employer and the employees.

25. The *Labour Relations Act* in section 62 does not concern itself with the affiliation of trade union. But section 62 does concern itself with whether an organization does have as its objective collective bargaining so that it can be capable of acquiring the rights and responsibilities under the *Labour Relations Act*.

26. In order to fulfil the Board's responsibilities under section 62, we must look to the constitution of the trade union. But as pointed out in *Waterloo Spinning Mills Ltd.*, the union's constitution is not the sole determiner of the cases because the *Labour Relations Act* regulates union membership rights regardless of certain constitutional provisions. Employees represented by trade unions may have rights beyond what the constitutions allow (for example under section 68). But, when we look at the constitution of the Melnor Shop Union before us, we see that the objectives expressly spelled out in the constitution are the regulation of employer/employee relations:

Article 3 - Objectives

The objectives of the union are

- (a) To unite within the union all workers within its jurisdiction.
- (b) To improve the wages and hours of work; to increase job security; and to better the working and living conditions of its members.
- (c) To establish and maintain collective bargaining with employers within its jurisdiction.
- (d) To promote good relationships with management.
- (e) To defend and extend democratic procedures and the civil rights and liberties to its members.

Initially this constitution was silent on the question of merger or affiliation with other organizations or trade unions. However, there is an unrestricted procedure for amending the constitution in article 10, quoted above. Those words are broad enough to contemplate merger with another union, which is a union within the meaning of the *Labour Relations Act*. Nothing on the face of the constitution suggests that its founders wished to preclude the possibility of a merger or prevent a constitutional amendment to let it pass. There has been no suggestion on the evidence that anyone ever claimed that the local union required unanimous consent to effect the merger until the employer raised the question in argument before the Board. Certainly the employer has the status and the right to require the union to establish its right to a declaration under section 62. But the following passage from the *Waterloo Spinning Mills Ltd.* is again appropriate on the facts before us:

39. ... the subjective expectations of the members may not be legally relevant; but when the Board is being asked to read some fundamental but unexpressed limitation into the constitution of an organization, it is at least interesting to note that the notion does not seem to have occurred to any of the members of the organization who gave evidence. And whatever the founding members and framers of the constitution may have thought about the desirability of the later merger, there is no reason to believe that they expected it to be impossible without unanimity.

Similarly, nothing in the evidence before us suggests that the founders or even the members of the Shop Union contemplated that they could only merge with another union if they could get unani-

mous consent of their members or conversely, that one vote could theoretically veto the desires of the remainder to affect what was believed to be an advantageous merger with another union.

27. Therefore, it is our view that the *obiter dicta* in *Astgen v. Smith* does not apply and is not entirely appropriate to considerations under section 62. But even if we are wrong about that, our experience in dealing with the regulation of labour relations convinces us that a constitutionally authorized merger of one trade union with another trade union is not a change in the essential objects of such an organization *per se*. Indeed, it is worth noting that even on the facts of the *Astgen v. Smith* situation, in the dissenting opinion of Mr. Justice Laskin, he reveals that the Labour Relations Board at that time had made a declaration of successorship under section 62 for these two unions. Thus, the property rights that the Court of Appeal were dealing with are separate and distinct from the successorship issues that the Labour Relations Board deals with under section 62.

28. We can now apply these principles to the case at hand. Here we have a shop union with a constitution giving it the object of overseeing the relations between the employees and the employer. We have evidence that it entered into a collective bargaining relationship with the employer and has been recognized by the employer as the employees' representative for a number of years. Having regard to all the circumstances, we are satisfied that the Shop Union was at all material times a trade union within the meaning of the *Labour Relations Act* which had collective bargaining rights. That organization then drew upon its constitutional authority to amend its constitution and embarked on a process to merge with the CAW. We are satisfied that the procedures adopted were *intra vires* the Shop Union and that good and sufficient notices were given to all the employees. We are also satisfied that the resulting meeting and votes had the effect of transferring the Shop Union's collective bargaining jurisdiction to the CAW and that the CAW accepted that jurisdiction by immediately setting about to attempt to employ and enforce these rights. We also see nothing on the evidence or in the submissions that would give cause for us to decline to issue a declaration under section 62.

29. Therefore, in consideration of all the above, the Board finds and declares, pursuant to section 62 of the *Labour Relations Act*, that the applicant has, by means of the steps taken to merge with and transfer jurisdiction from the predecessor trade union, acquired the rights, privileges and duties of the Melnor Shop Union which was the bargaining agent for the employees of the respondent defined in a collective agreement between the intervener and the predecessor trade union.

0414-85-R; 2810-88-R Union of Bank Employees (Ontario) Local 2104, Canadian Labour Congress, Applicant v. **National Trust**, Respondent v. Group of Employees, Objectors; Janeen G. Snare, Applicant v. The Union of Bank Employees Local 2104, Respondent v. National Trust, Intervener

Bargaining Unit - Certification - Reconsideration - Union and employer requesting that Board amend the street address on the certificate to reflect a change in location - No employee raising an objection - No intervening collective agreement - Board agreeing to request in these narrow and unique circumstances

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *K. Davies*.

APPEARANCES: *Janeen G. Snare* for the applicant in; *David Devine* for the respondent; *Richard J. Charney* and *Eli Gershkovitch* for the intervener.

DECISION OF THE BOARD; April 14, 1989

I

1. This is an application for termination of bargaining rights brought by employees currently working at 1410 Victoria Park Avenue. In order to appreciate the context in which this application arises, it is necessary to sketch in some background.

2. In a decision dated February 2, 1988 the Board (differently constituted) certified the union as bargaining agent for the employees of a number of branches of the respondent employer, including the branch at 1882 Eglinton Avenue. Subsequently, the Board was advised that the branch at 1882 Eglinton Avenue had been relocated to 1410 Victoria Park Avenue. The union and the employer *both* requested the Board to amend the street address on the certificate to reflect this change in location and facilitate their bargaining. This joint request was circulated to all of the parties of record for comment. None was forthcoming. The Board further directed that a decision explaining the situation and inviting submissions be posted in the respondent's location at 1410 Victoria Park Avenue in prominent places where it would come to the attention of the employees working there. In the Board's opinion those employees were entitled to notice of the request made by their employer and the trade union, and should be given the opportunity to make representations. Once again, none were forthcoming.

3. When this termination application came on for hearing before the Board on Tuesday, April 4, 1989, the representative of the applicant employees was advised that, strictly speaking, there were no bargaining rights at 1410 Victoria Park Avenue because the certificate was site specific. She was asked whether, as the employees representative, she had any objection to the amendment of the original certificate, to reflect the employer's change of address. She indicated that she did not.

4. Section 106(1) of the Act gives the Board a broad power to reconsider, vary or revoke any decision, at any time, if it considers it advisable to do so. (See *Re International Association of Machinists and Genaire Ltd. and Ontario Labour Relations Board* (1958), 58 CLLC ¶15,416 (O.C.A.); *Bakery and Confectionery Workers International Union of America, Local 458 et al. v. White Lunch Limited et al.* (1966) 66 CLLC ¶14,110 (S.C.C.); and *Labour Relations Board (British Columbia) et al. v. Oliver Cooperative Growers Exchange* (1963), S.C.R. 7.) In the instant case,

both bargaining parties have requested the variation mentioned above. No employee has raised any objection and no one either seeks a hearing or the opportunity to make further representations. There is no intervening collective agreement which might be disturbed by the variation of the certificate (see the remarks of Laskin, C.J.C. in *Beverage Dispensers and Culinary Workers Union, Local 835 et al. v. Terra Nova Motor Inn Ltd.* (1974) 74 CLLC ¶14,253 (S.C.C.)). None of the parties have raised, nor will the Board here canvass, those policy considerations which might bear upon the exercise of the Board's discretion in circumstances other than the narrow and unique ones currently before us. Accordingly, while we are not entirely sanguine about the exercise of this discretion under section 106(1), we are prepared, in this case, to accede to the bargaining parties' request.

5. Having regard to the foregoing, the decision of February 2, 1988 certifying the union as the bargaining agent for the full-time and part-time employees at the respondent's branch at 1882 Eglinton Avenue is hereby varied and revoked to substitute, instead, the street address of 1410 Victoria Park Avenue. New certificates will issue bearing the amended street address. The applicant and respondent are directed to return the certificates originally issued.

II

6. With the above-noted amendment, the trade union currently holds bargaining rights for two bargaining units framed as follows:

Bargaining Unit #1:

All employees of National Trust at 1410 Victoria Park Avenue, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

Bargaining Unit #2:

All employees of National Trust at 1410 Victoria Park Avenue regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees.

7. On the basis of the evidence and representations before it, the Board is satisfied that not less than forty-five per cent of the employees of National Trust in bargaining unit #1, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on March 17, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

8. The Board directs that a representation vote be taken of the employees of National Trust employed in bargaining unit #1 described in paragraph 6 above. All those employed in that bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

9. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with National Trust.

10. The Board is further satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in bargaining unit #2, at the time the application was made, were members of the applicant on March 17, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. The application is dismissed with respect to bargaining unit #2.

12. The matter is referred to the Registrar.

2279-86-U Peter Rocca, Complainant v. Ontario Catholic Occasional Teachers Association, Respondent v. Metropolitan Separate School Board, Intervener

Duty of Fair Representation - Ratification and Strike Vote - Unfair Labour Practice - Complainant occasional teacher failing to obtain a permanent teaching position and failing to obtain assignments as an occasional teacher - Employer denying complainant access to his complete personnel file - Whether union's failure to pursue grievance constituted a breach of fair representation duty - Whether the notice of union meetings violated the Act - Complaint dismissed - Complainant failing to show he had any entitlement to jobs or his file

BEFORE: R. A. Furness, Vice-Chair, and Board Members W. H. Wightman and D. A. Patterson.

APPEARANCES: Charles Roach for the complainant; Bernie Hanson for the respondent; Barry W. Earle, Q.C. and Vince Nichilo for the intervener.

DECISION OF THE BOARD; April 28, 1989

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant Peter Rocca has alleged that he has been dealt with by the respondent contrary to the provisions of sections 68 and 72(5) and (6) of the *Labour Relations Act*. The complainant has alleged that the respondent has failed to grieve separate complaints brought to its attention by the complainant. These complaints are as follows:

1. The intervener failed to hire Mr. Rocca as a full-time teacher;
2. The intervener failed to continue to hire Mr. Rocca as an occasional supply teacher from and after June of 1986;
3. The intervener failed to allow Mr. Rocca access to files pertaining to him in its possession contrary to the provisions of the collective agreement, and
4. The intervener unilaterally and detrimentally changed his teaching area from area 3 to area 5 contrary to the collective agreement.

In addition the complainant complained that various general meetings of the respondent including one held on October 20, 1986 violated the *Labour Relations Act*, section 72(5) and (6) in that insufficient notice was given of general meetings. In addition it was alleged that the notice given to the members including Mr. Rocca violated the provisions set out in the respondent's constitution.

2. Throughout this decision the respondent will be referred to from time to time by its acronym OCOTA. This decision will make reference to the Ontario English Catholic Teachers Association also known by its acronym OECTA. The complainant was a member of OCOTA which represents occasional supply teachers in collective bargaining with the intervener and has been a party to collective agreements with the intervener with respect to occasional supply teachers. OECTA has been a party to a series of collective agreements with the intervener with respect to permanent teachers employed by the intervener. The complainant was never a member of OECTA and was never in a bargaining unit represented by OECTA. However, from time to time, as will become apparent in the decision, an officer of OECTA, Douglas Knott did have a meeting, did write a letter to the complainant and did have a telephone conversation with the complainant.

3. Peter (Pietro) Rocca is a Roman Catholic who was born in Italy. He is a Canadian citizen and has taught in Africa and Quebec prior to coming to Ontario. In 1972, he obtained a teaching certificate from Teachers College in Montreal. In addition in 1975 he obtained a Bachelor of Education degree with a speciality in Mechanical Engineering from the University of Quebec. He also holds additional certificates from York University and Durham College in high school courses. He has an Ontario teaching certificate since 1983 for teaching secondary level, technological studies and college level applied technology. He is a certified teacher in English and French and his native language is Italian. He has held a number of teaching positions prior to coming to Ontario.

4. The complainant initially made an application for permanent employment with the intervener in March of 1984. He participated in an interview with Mr. Nichilo and two unnamed principals on March 29, 1984. Although there had been requests from three principals to the intervener to hire the complainant in 1984, he was not hired. However, the complainant has not alleged that his failure to be appointed to a permanent position in 1984 was in any way improper.

5. Mr. Rocca worked briefly as an occasional supply teacher for the York Board of Education and for the Toronto Board of Education during 1984 and 1985. He commenced employment with the intervener as an occasional supply teacher in January of 1985. At that time he chose to teach and generally make himself available in area 3. The intervener has divided its geographic jurisdiction into five areas. The complainant resides in area 3. He received assignments daily at various schools operated by the intervener. Most of his daily assignments were in area 3. However, during the winter, if he was needed, he would be assigned beyond area 3.

6. During the period from April to June of 1985, the complainant was advised by three principals namely Mr. Lacoste, Mr. Patenaude and Father Campagna that they would submit recommendations to the intervener and that he would be appointed to a permanent teaching position. He was also advised during this period by a vice-principal, Mr. Astill, that he would be recommended for a summer position with the intervener. The complainant gave evidence that in August of 1985 he was also offered a part-time position at the Edmund Rice High School. The complainant testified that in June of 1985 he was advised by Mr. Astill that the teacher personnel department of the intervener did not want to hire him for a permanent position. The complainant informed the Board that on or about July 2, 1985, he had a telephone conversation with Winifred Pyman, the teacher personnel officer with the intervener, concerning his application for permanent employment. He gave evidence that Mrs. Pyman told him that he could not have a full-time position because he was an Italian-Canadian. Mrs. Pyman is also said to have advised the complainant

that he was no longer a suitable candidate because he had broken "our rules and regulations". He gave evidence that he was also told by Mrs. Pyman that "many are elected, but only a few are chosen". It was the position of the complainant that he was unaware of which rules and or regulations he was supposed to have broken.

7. Following the conversation with Mrs. Pyman, the complainant gave evidence that he spoke to a Mr. Barone of the intervener and advised him of the conversation with Mrs. Pyman. Mr. Barone arranged an interview for the complainant with a Kevin Kobus, the assistant superintendent of teacher personnel of the intervener, on July 4, 1985. The complainant stated that Mr. Kobus promised to make inquiries and get back to him. It was the evidence of the complainant that Mr. Kobus never contacted him after the interview.

8. It was clear from the oral evidence and the extensive written evidence that the complainant was simultaneously pursuing several lines of concurrent inquiries with respect to obtaining permanent employment with the intervener. The complainant made his situation known, as he interpreted it, to the trustees of the intervener, the chair and the director of education of the intervener. In addition members of the Legislature were canvassed as well as the Minister of Education. The oral and written evidence confirm the experience of Mr. Fredette that not all of the persons who received these letters were completely aware of the steps which the complainant had taken. In addition the complainant arranged for a meeting with the trustees of the intervener and also approached the Parkdale Community Legal Services Inc. in order to secure permanent employment as a teacher with the intervener. Benchmans Kipp, the directors of education provided the final position of the intervener with respect to permanent employment when he stated in a letter dated October 22, 1986, to the complainant, "I must advise you that I am not prepared to offer you a position with this Board".

9. On November 14, 1986, the complainant filed a complaint with the Ontario Human Rights Commission with respect to the alleged discrimination he received at the instance of the intervener. However, the complainant's counsel informed the Board that initially, at least, the complaint was unsuccessful because the inquiry officer decided against recommending the appointing of a Board.

10. Raymond Fredette is the executive assistant of the respondent and has been in this position since April of 1984. There are fourteen locals of the respondent and it is his responsibility to service these locals. He informed the Board that the respondent is an affiliate of OECTA and that OECTA had given the respondent seed money and other assistance. In addition, OECTA covers the expenses of OCOTA above its own sources of money, permits OCOTA to use OECTA's services in the office and provides a staff person and a secretary. However, OECTA has no part in the decisions made by the respondent. At all material times the complainant was a member of the respondent. The Metropolitan Toronto local of the respondent which was certified as a bargaining agent on February 7, 1985, and has a fluctuating membership of about 500 occasional supply teachers. The first collective agreement with respect to the respondent's Metropolitan Toronto bargaining unit was signed between the respondent and the intervener and was ratified on October 20, 1985 and was made retroactive to September 1, 1985. Notice of the respondent's general meetings are given by mail to the members at their homes and by posting notice of the meetings in the intervener's schools. Mr. Fredette testified that the turnout at most of these meetings consisted of between 20 and 30 persons and that there had been no complaints with regard to the procedural aspects of the meetings. Mr. Fredette gave evidence with respect to a series of meetings, telephone conversations and letters between himself and the complainant.

11. The complainant gave evidence that he attempted to contact Mr. Fredette in June and

July of 1985 and that he had been unable to speak to him. Mr. Fredette gave evidence that he was unaware of these attempts during that period. During this period of time the complainant contacted the Ontario Secondary School Teachers Federation (OSSTF), and sought its assistance with respect to his desire to obtain full-time employment. The OSSTF put the complainant in contact with the solicitor for OSSTF. The solicitor provided him with a letter dated August 1, 1985, to the intervener. There was also evidence before the Board from Douglas Knott, the Deputy General Secretary of OECTA that he was contacted on July 25, 1985, by yet another solicitor who advised him that the complainant had requested assistance. Mr. Knott gave evidence that he advised the other solicitor that the respondent was in the process of organizing the occasional supply teachers employed by the intervener and asked her to send the complainant to see Mr. Fredette. Mr. Knott gave evidence that on July 29, 1985 he wrote a memorandum to Mr. Fredette advising him that a teacher would be coming to see him. It is clear from the evidence however that the complainant did not come to the office of Mr. Fredette until September 4, 1985.

12. The complainant informed the Board that during the meeting on September 4, 1985, he advised Mr. Fredette of all of the circumstances concerning his application for permanent employment with the intervener. The complainant testified that on this occasion Mr. Fredette advised him that "I believe you have a grievance. I will make some inquiries, study the collective agreement and I will contact you." It was the evidence of Mr. Fredette that at this meeting the complainant advised him of the recommendations of the three principals but did not advise him of the alleged discriminatory statement made by Mrs. Pyman with respect to his being an Italian-Canadian. It was also the evidence of Mr. Fredette that the complainant did not advise him of the fact that Mr. Kobus had promised to make inquiries on the complainant's behalf. Mr. Fredette gave evidence that during this meeting he advised the complainant that in his view there was no grievance which could be filed with the intervener. Mr. Fredette explained to the Board that he had reached this conclusion because there was no collective agreement yet in existence under which a grievance could be filed and that it was also his position that even if the collective agreement had been in existence at that time it would not contain a provision concerning the permanent employment of occasional supply teachers. Mr. Fredette informed the Board that he advised the complainant that he would in any event send the matter to the solicitor who was the respondent's solicitor at that time. Mr. Fredette stated that at that time Mr. Rocca recognized the name of the solicitor and stated that he had already been to see that solicitor and that he wanted to go elsewhere. Mr. Fredette's response to this was to advise the complainant that the respondent would not give an authorization to see anyone else and that Mr. Fredette would contact the solicitor. At this point various documents were provided by the complainant to Mr. Fredette. However there is a dispute as to precisely which documents were supplied to Mr. Fredette by the complainant.

13. It was the position of Mr. Fredette that he contacted the solicitor shortly after the meeting on September 4, 1985. He informed the Board that he reviewed the solicitor's letter dated August 1, 1985, to Mrs. Pyman and that as a result of his conversation with the solicitor he was satisfied that there was no grievance to follow up and that there was no other avenue available to the complainant other than to wait for a response to the solicitor's letter. It was the evidence of Mr. Fredette that after his conversation with the solicitor he contacted the complainant later in the month of September of 1985 and advised him of his position and of the course of action which he intended to pursue. The Board notes that the complainant apparently did not refer to the alleged incident with Mrs. Pyman with respect to the remarks about being an Italian-Canadian to the solicitor because the solicitor made no reference to this allegation in his letter to Mrs. Pyman.

14. The complainant testified that during a meeting with Johanne Stewart, the superintendent of teacher personnel, on April 22, 1986, he was offered no less than three permanent teaching positions with the intervener. However, these offers were apparently subject to obtaining refer-

ences from principals. When the complainant subsequently contacted Ms. Stewart he was informed that she was still trying to obtain these references.

15. There is a considerable difference between the testimony of Mr. Fredette and the complainant as to when the complainant initially made the request to Mr. Fredette to see a lawyer. The difference is between September of 1985 and September 1986. In cross-examination the complainant agreed that it was possible that he had confused the years with respect to this part of his testimony and agreed that it was possible that Mr. Fredette advised him in September of 1985 rather than in September of 1986 that he would contact the solicitor. Having regard to the admission by the complainant that it was possible that he had confused the years with respect to that portion of his testimony, the Board finds that Mr. Fredette advised the complainant in September of 1985 rather than 1986 that he would contact the solicitor with respect to the complainant's situation.

16. Mr. Fredette gave evidence that on November 10, 1986 he had a conversation with the complainant regarding the rights of employees with respect to access to their personnel files pursuant to article 11 of the collective agreement. During this conversation it became apparent to Mr. Fredette that on November 4, 1986 the complainant had attempted to exercise some self help in order to obtain access to his personnel file. The evidence of the complainant and Mr. Fredette established that two police officers were called in to remove the complainant from the intervener's premises. It was the evidence of Mr. Fredette that Christopher Cromien, the intervener's superintendent of teacher personnel, had offered to provide the complainant with a letter which would state that there was nothing in the complainant's personnel file which fell within the provisions of article 11 of the collective agreement. It was the evidence of Mr. Fredette that on that same day Mr. Cromien had advised him that the complainant had attended at his office on November 4, 1986, and had insisted upon seeing his complete personnel file. Mr. Cromien reiterated to Mr. Fredette that he was prepared to provide a letter to the effect that there was nothing in the complainant's personnel file within the provisions of article 11 of the collective agreement. It was the view of Mr. Fredette that the intervener had complied with its obligations under article 11 of the collective agreement and that a letter from the intervener stating that there was nothing in the complainant's personnel file within the provisions of article 11 would prevent the intervener on a future occasion from relying on any document which might then be in its possession and which fell within the provisions of article 11. However, it was the position of the complainant that at approximately 5 p.m. on November 4, 1986, he was entitled to have such a letter there and then notwithstanding the offer of Mr. Cromien to have it prepared the next day. It appears that Mr. Cromien pointed out that at 5 p.m. it was not possible to get such a letter typed. The complainant was shown an empty personnel file and at that point he left Mr. Cromien's office and the intervener's premises. Mr. Fredette sent a letter to the complainant dated November 10, 1986, and based upon what he had heard of the events of November 4, 1986, he refused to pursue a grievance with respect to that matter.

17. There were several references in the evidence to a "red flag" with reference to the complainant's personnel file. It is not clear from the evidence whether this phrase "red flag" originated with the personnel of the intervener or whether this was an appellation used by Mr. Fredette or a staff lawyer at the Parkdale Community Legal Services Inc. In our view, this phrase appears to have been initially attributed to Mr. Fredette and thence to the staff lawyer and/or a student-at-law who used the phrase while communicating with the complainant who then referred to the phrase in a letter dated October 7, 1986 to Mr. Fredette. It appears from all of the evidence before the Board that, as a result of a report from a Montreal School Board, the intervener was no longer prepared to offer the complainant a permanent teaching position. The intervener suggested that the complainant apply for a permanent teaching position with another school board.

18. The complainant gave evidence that until June of 1986 he regularly worked for the intervener in its area 3 as an occasional supply teacher. After June of 1986 he did not receive further assignments to teach in that capacity for the intervener. He gave evidence then on October 21, 1986, he was advised by Julie Korendy, the supply teaching officer, personnel department of the intervener, that his area had been changed from area 3 to area 5. The complainant gave evidence that on November 10, 1986, he advised Mr. Fredette that the intervener had unilaterally changed his area and that he had been cut off from his position as an occasional supply teacher. The complainant repeated his contentions in a letter to Mr. Fredette dated January 30, 1987.

19. It was common ground that the intervener has divided its geographic jurisdiction into five areas for the purpose of the assignment of occasional supply teachers and that there is a dispatcher for each area. Occasional supply teachers choose one of these five areas as a home base. Occasional supply teachers may also specify other factors which affects their availability such as subject matter and panel preferences. Occasional supply teachers complete a form on an annual basis which specifies these factors. However, these forms may be amended by notifying the intervener. It was the position of Mr. Fredette that the dispatchers in each area do not in the normal course of events have these applications in their possession. Mr. Fredette testified that he advised the complainant to check with the dispatcher to ensure that there had not been an administrative error with respect to his preferred area and other matters which affected his availability. Mr. Fredette informed the Board that this was his normal practice when advised of similar problems which from time to time were experienced by other occasional supply teachers. It was the position of Mr. Fredette that he was not advised by the complainant that he had spoken to Ms. Korendy and that he was not provided with a copy of a letter dated October 21, 1986, which the complainant had sent to Ms. Korendy. It was the evidence of Mr. Fredette that upon receipt of the complainant's letter dated January 30, 1987, he contacted Mr. Cromien on February 4, 1987, and was advised that the complainant had not been cut off or suspended from the list of occasional supply teachers. Mr. Fredette stated that Mr. Cromien informed him that for the purposes of availability the complainant had restricted himself to secondary level industrial arts/drafting. This information was conveyed to the complainant in a letter dated February 10, 1987. The complainant responded in a letter dated March 5, 1987, and Mr. Fredette informed the Board that he was unaware of the "numerous inaccurate statements" that the complainant was referring to in this very brief letter.

20. Mr. Fredette testified that he had decided that a grievance was not yet justified having regard to all of the events as he understood them. He emphasized that the possibility of an administrative error had not to his knowledge been considered and inquired about. It was also his view at that time that the lack of calls for the complainant to work as an occasional supply teacher may have resulted from the restrictions which the complainant had in restricting his availability to industrial arts/drafting at the secondary level. Mr. Fredette explained that, at that time with the full funding for the separate school system, a classification of teachers known as designated teachers pursuant to Bill 30 were being given precedence with respect to openings for occasional supply teachers in assignments to schools and that there were too many teachers qualified with respect to industrial arts/drafting due to this surplus of former public school teachers. This was Mr. Fredette's perception of the situation and no doubt was based upon his day to day familiarity with the teaching requirements and positions within the intervener. The Board notes that there was no evidence presented of any kind which contradicted Mr. Fredette's perception of this state of affairs.

21. The complainant gave evidence that the notice of the general meeting to be held on October 20, 1986, was mailed to him on or about September 30, 1986, and that it was received by him on October 6, 1986. This evidence was not contradicted and, indeed, Mr. Fredette confirmed that the respondent advised its members of such general meetings by postings in schools and by means of flyers which were mailed to the members' homes. Mr. Fredette also confirmed that the

length of notice of about two weeks was the general practice adopted by the Metropolitan Toronto local of the respondent. There was also evidence from Mr. Fredette that the attendance of members at the general meeting on October 20, 1986 was at about the usual level of attendance at earlier meetings. There was nothing in the evidence before the Board that anyone made a motion at the meeting to have the meeting declared not in conformity with the constitution. Moreover, no motion was brought at the meeting with respect to the lack of the requisite notice according to the constitution. There was evidence before the Board that the complainant did make a motion which was defeated, to the effect that members' views should be canvassed by mail ballots. It was the view of the complainant that this would result in a wider participation of the membership in the deliberations and the decisions of the Metropolitan Toronto local of the respondent.

22. There were differences in the recollections of the complainant and Mr. Fredette concerning the sequence of events and what was actually said during their conversations. Mr. Fredette gave his evidence in a straightforward manner and was not shaken on cross-examination. The complainant, on the other hand, did from time to time vary his testimony and, in our view, there were also inconsistencies in the complainant's reaction to allegations which he made. For example, the remarks about Italian-Canadians which Ms. Pyman allegedly made were neither referred to in the complaint nor were they apparently mentioned to the solicitor who wrote to Ms. Pyman on August 1, 1985. Such allegations surfaced for the first time during the complainant's evidence. No credible explanation was offered for the delays and omissions of such a serious allegation. There were also discrepancies in the assertions of the complainant with respect to the applications for employment and the work performed for school boards other than the intervener and the actual records of such school boards. It is the opinion of the Board that Mr. Fredette and Mr. Knott were the more reliable witnesses and in the areas where there is a conflict in the testimony of Mr. Fredette and Mr. Knott on the one hand and the complainant on the other hand, the evidence of the former is to be preferred.

23. The Board heard evidence with respect to the circumstances surrounding the mailing of a letter dated September 26, 1986, from Mr. Fredette to the complainant. There was evidence which indicated that the dates on the envelope as indicated by a postage meter did not correspond with the actual date of mailing of this letter. The complainant sought to draw some implications with respect to the credibility of Mr. Fredette. The secretary who typed Mr. Fredette's letters gave evidence of her practice in this regard. On this uncontradicted evidence before it, the Board finds that this letter was written on the date that it bears and that there is no basis for questioning the credibility of Mr. Fredette. It appears that the postage meter was incorrectly set for some unknown period of time in OECTA's mail room.

24. It was the position of the respondent that it had fulfilled its duties under section 68 of the *Labour Relations Act*. The respondent pointed out that prior to September 1985 there was no collective agreement in force between the respondent and the intervener and that, in any event, when such a collective agreement came into force it did not provide for a grievance where the intervener refused to employ a member of the bargaining unit represented by the respondent in a position covered by the collective agreement between the intervener and OECTA. The respondent adopted the position that the reason for not filing a grievance for the continuation of requests for occasional supply teaching for the complainant after June of 1986 was because he had not been removed from the list of occasional supply teachers. Moreover, the respondent reasoned, the complainant had made no attempt to resolve what may have been an administrative error. With respect to the access to the complainant's records, the respondent pointed out the complainant, under the provisions of the collective agreement between the respondent and the intervener, had been afforded the access provided for therein. In these circumstances, there was nothing to grieve.

25. The complaint with respect to the alleged violation by the respondent of section 72(5) and (6) was denied by the respondent. It was the position of the respondent that on the evidence before the Board no one had been denied an entitlement to vote in order to ratify a proposed collective agreement. It was also the position of the respondent that the ratification vote had been conducted in such a way that the employees had an ample opportunity to cast their ballots. The respondent also pointed out that no objection was raised by the complainant to the arrangements for the vote at the time the vote was conducted.

26. Section 68 of the *Labour Relations Act* provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Section 68 requires a trade union which represents employees in a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith. In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, the Board described the duty of a trade union under section 68 as follows:

35. In this context, an employee in a bargaining unit for which a trade union exercises exclusive bargaining rights has no reason to expect that his personal interests will always be fully served by the trade union. He does, however, have a legitimate expectation that choices made by the trade union, whether ultimately favourable or adverse to his personal interest, will at least be honest, fair and rationally responsive to interests and circumstances relevant to the decision. It is this employee to which section 68 is addressed.

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated.

See also *Gerald Lecuyer*, [1985] OLRB Rep. July 1099 at page 1117. In dealing with the processing of grievances, a trade union is required to put its mind to the merits of each grievance and to endeavour to engage in a process of making a rational decision which cannot be branded as either implausible or capricious. See *Kesar Singh Riyait*, [1980] OLRB Rep. July 1001 at page 1007. In that case the Board stated at page 1008 as follows:

19. It is clear that in order to establish a breach of section 60 [now section 68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

27. An employee in the bargaining unit has no absolute right to have any grievance taken to arbitration and this applies to grievances in such critical areas of security of employment. The Board has held that where such critical job interests are at issue and where they may be affected the actions of a trade union, the conduct of the trade union will be subject to the closest scrutiny. See *Gerald Lecuyer*, *supra* at page 1117. The Board expressed it this way in *Antonio Melillo*, [1976] OLRB Rep. Oct. 613 at pages 617-618:

In determining whether section 60 [now section 68] has been violated by the trade union, the Board has stated that it does not assume the posture of an arbitration board and adjudicate the merits of the complainant's grievance against the employer. While the Board does receive and consider evidence of all the circumstances surrounding the grievance, it does so for the limited purpose of determining whether the union has acted in an arbitrary, discriminatory, or bad faith manner in the representation of the complainant The policy behind this approach is not difficult to fathom. On the one hand, the fact that a grievance appears meritorious may lend credence to an employee's claim that he has been unfairly represented. For example, it may permit the Board to draw an inference of bad faith and/or discrimination in situations where the circumstantial evidence in respect of the union's motivation might otherwise prove inconclusive. On the other hand, the fact that a grievance does not appear to have merit will generally be supportive of the trade union's defence to an unfair representation complaint. ... That is not to say, however, that the Board will never find a breach in circumstances where the complainant's grievance appears to lack merit Nor is it to say that a meritorious grievance will necessarily be dispositive of the union's defence. The merits of the complainant's grievance is but one of a number of factors (albeit an important one) of which the Board may take account in arriving at a judgment about whether the union has dealt with his grievance in a proper manner. Among the other factors which the Board may consider are: the importance of the particular grievance to the employee concerned, the implications of a settlement or arbitration on the other members of the bargaining unit both now and in the future, whether there is any independent evidence of bad faith or discrimination, the degree of consideration given the grievance by the union, and the experience and qualifications of the trade union officials who have been involved in the processing of the grievance.

The duty of fair representation within the meaning of section 68 extends only to the conduct of a trade union within the confines of the bargaining relationship with the employer. It does not extend to matters outside the bargaining relationship. See *Raphael A. Julien*, [1985] OLRB Rep. Apr. 537 at page 545 and *James Richard Hughes*, [1986] OLRB Rep. Jan. 103 at 111.

28. This complaint as modified at the commencement of the hearings raises the following issues:

- I whether the respondent's failure to file a grievance with respect to the complainant's failure to obtain a permanent teaching position with the intervener constituted a violation of section 68.
- II whether the respondent's failure to pursue a grievance with respect to the intervener's refusal to permit the complainant access to his complete personnel file on or about November 4, 1986 constituted a violation of section 68.

- III whether the respondent's handling of the complainant's failure to obtain assignments as an occasional supply teacher with the intervener including the change in area after June 1986 constituted a violation of section 68 and,
- IV whether the notice given of a general meeting of a local of the respondent on October 20, 1986 constituted a violation of section 72(5) and (6).

29. Counsel for the complainant argued that the intervener was under a duty to operate its school system in accordance with the laws of Ontario and that this meant that the intervener must act fairly towards the complainant. It was the argument of counsel that this meant giving the complainant reasons for its conduct and allowing him an opportunity to respond. In support of his position counsel cited the following cases: *Paine v. University of Toronto et al*, 34 O.R. (2d) 770; *Re Evershed and The Queen in Right of Ontario et al*, 50 O.R. (2d) 198; *Casagrande v. Hinton Roman Catholic Separate School District No. 155 and Board of Reference* 51 Alta L.R. (2d) 349; *Re Campbell and Stephenson et al* 44 O.R. (2d) 656; and *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police and Attorney General for the Province of Ontario* [1979] 1 S.C.R. 311. In the view of the Board none of these authorities is dispositive of the matter before it in the first issue, that is to say, the complainant's failure to obtain a permanent teaching position with the intervener. These cases deal with the exercise of statutory powers and do not deal with the exercise of a contractual power, that is to say, the duty of fairness under section 68. None of the cases cited by counsel for the complainant deal with a failure to hire a person. The issue here is whether the complainant has a right under a collective agreement. In order for the complainant to require the respondent file a grievance on his behalf the complainant must show that there is a right under a collective agreement. The collective agreement which covered the complainant is between the respondent and the intervener. There is nowhere in the collective agreement any provision which requires the intervener to hire or the respondent to request the intervener to hire an occasional supply teacher to a permanent position. As was referred to earlier the cases relied on by counsel for the complainant deal with the loss of employment and the exercise of a statutory power. Those cases considered the question of the loss of employment. For example in *Casagrande, supra*, a teacher was dismissed for denominational causes (premarital sexual intercourse). The Court held that while the School Board must act fairly it could indeed dismiss for denominational causes. Similarly in *Paine, supra*, (the denial of tenure to a university professor); in *Re Evershed, supra*, (revocation of teaching certificate, after being found guilty of importing pornography and possession of drugs, which led to the termination of a teacher's employment); in *Re Campbell and Stephenson, supra*, (teacher's employment terminated after being found guilty of indecent assault); and *Nicholson, supra*, (dismissal of a policeman without his being told why his services were no longer required). It is apparent that it is one thing to dismiss an employee in accordance with statutory powers under which an employer or a Board of Education operates, it is quite another thing for the complainant to demand a permanent job and to demand that the respondent file a grievance when he is not able to secure a permanent job. The Board finds that the complainant has not established that he had any entitlement with regard to this issue and since there was no entitlement under the collective agreement it may not be said that the respondent has violated its duty under section 68. The complaint with respect to this first issue is therefore dismissed.

30. With respect to second issue, the complainant required the respondent to pursue a grievance with respect to the intervener's refusal to permit the complainant access to his complete personal file. The only provision of the collective agreement which covers the complainant and which deals with access to records is to be found in Article 11:

ARTICLE 11 - ACCESS TO RECORDS

11.01 On application to the appropriate Board administrator an Occasional Teacher shall be entitled to peruse and make a written copy of any "Principal's Report on Substitute Teachers" which pertains to him/her.

11.02 If a Principal's report on substitute teachers is adverse in nature, any Occasional Teacher concerned may, if he/she acknowledges receipt of a copy of such report, file a reply thereto with the Board within ten (10) days from such receipt and such reply shall become a part of the Occasional Teacher's file.

11.03 If the Teacher Personnel Department receives a complaint from a student or his parent or a Board employee concerning an Occasional Teacher, the appropriate Board administrator shall discuss the complaint with the Occasional Teacher if the complaint or a memorandum thereof is to be placed in the Occasional Teacher's file. The Occasional Teacher may make a written copy of the complaint or memorandum and append her/his comments thereto.

It is apparent that the access to record referred to in Article 11 is narrow in its scope. It gives an occasional teacher the right to peruse and make a written copy of any Principal's Report on Substitute Teachers and in addition if there is a complaint from a student or his parent or a board employee concerning an occasional teacher, the appropriate board administrator is required to discuss the complaint with the occasional teacher and, if the complaint or a memorandum thereof is to be placed in the occasional teachers' file, the occasional teacher may make a written copy of the complaint or memorandum and append his comments thereto. It appears to the Board that in fact no such documents contemplated under article 11 existed with respect to the complainant. In our view the complainant was seeking, through the vehicle of article 11, complete access to his personnel file rather than to an access of the records contemplated by article 11. The Board is in agreement with the position taken by Mr. Fredette that not only had the intervener satisfied its duty under that article but had also gone beyond its duty in offering to provide a letter to that effect to the complainant. However, the complainant was not satisfied with the offer made by Mr. Cromien on November 4, 1986, because this was not what the complainant was in fact seeking. Under the collective agreement there is no right for the complainant to peruse and have access to his personnel file. Such personnel files are normally regarded as confidential by an employer in that they frequently contain references which may be of a frank and adverse point of view. The Board finds that the complainant had no right under the collective agreement to seek what he was seeking and accordingly the grievance referred to in the second issue does not give rise to a duty under section 68 and the complaint referred to in the second issue is hereby dismissed with respect to the claim that the conduct of the respondent constituted a violation of section 68.

31. In the third issue the complainant is complaining about the handling of his complaint concerning his apparent failure to obtain assignments as an occasional supply teacher with the intervener after June of 1986. The evidence before the Board established that when Mr. Fredette was made aware of the complainant's problem in this matter he approached the problem in the same way that he had approached similar problems with other occasional supply teachers. There was no evidence before the Board of any hostility by Mr. Fredette towards the complainant. The Board finds that Mr. Fredette's conduct was neither discriminatory, nor arbitrary nor in bad faith in that based upon his experience of how the dispatchers employed by the board operated, he directed the complainant to first endeavour to eliminate the possibility of an administrative error. Such a systematic investigation of the complainant's problem is a matter of common sense. Indeed, Mr. Fredette pursued the matter in a follow-up with Mr. Cromien. This conduct illustrates the concern and seriousness with which Mr. Fredette treated this matter. It also appeared to Mr. Fredette on a fair reading of the situation that the complainant had restricted his availability in the area where he was working and where he was prepared to work. Mr. Fredette viewed the complainant's situation in the light of the developments caused by Bill 30. Due to the confusion, it appeared that

Mr. Fredette was never clearly informed that the complainant had taken these elementary steps. The Board observes that for reasons perhaps known to the complainant, but unclear to it, the complainant chose to seek relief or redress for his various complaints through more than one person or channel and to do so simultaneously. Moreover, on such occasions he chose to keep the individuals through whom he was making his appeals in ignorance, in whole or in part, of each others activities on his behalf. Hence the confusion which accompanied this and other issues in this complaint. In these circumstances it is understandable that both he, and they, would encounter confusion leading to incorrect assumptions or inappropriate action. There were a number of examples in the evidence of Mr. Fredette and Mr. Knott to the effect that there was considerable exasperation and they were at a loss to know what to do when certain events were revealed of which they had no prior knowledge. The Board finds that Mr. Fredette listened to the complainant, offered certain advice, addressed the concerns of the complainant and was genuinely of the view that the situation that the complainant found himself in was situational having regard to the introduction of Bill 30. Quite clearly, being on a list of occasional supply teachers is no guarantee of continuing referrals or indeed any referrals as the evidence established with the other school boards which were referred to in evidence by the complainant.

32. In the alternative, with regard to this third issue, the Board agrees with the submissions of counsel for the respondent that a grievance had not yet developed under the collective agreement. Article 7.09 of that collective agreement provides as follows:

7.09 In the event an Occasional Teacher is suspended or removed from the Occasional Teacher List for disciplinary reasons, or the Occasional Teacher has been advised by the Superintendent of Teacher Personnel or designate that suspension or removal is being considered, the Occasional Teacher may request a meeting with the Superintendent of Teacher Personnel or designate to discuss the matter provided such request is made with reasonable promptness. At any such meeting, the Occasional Teacher may be accompanied by the President of the Metro Local of OCOTA or designate.

There was no evidence that the complainant had made such a request for a meeting and there was also no evidence that such a meeting had been refused. That article is the only provision in the collective agreement which directly affects the removal of an occasional teacher from the list of occasional teacher. It was always open and remains open to the complainant to request a meeting pursuant to that article. Article 7.09 is the only protection under the collective agreement for occasional supply teachers who have been suspended or removed from the list. A fair assessment of Mr. Fredette's conduct does not support a finding that he behaved unreasonably or that his conduct was arbitrary, discriminatory or in bad faith in representing the complainant.

33. It was argued by counsel for the complainant that Mr. Knott and OECTA were under some kind of a duty to help the complainant with respect to these first three issues. Counsel advanced the argument that because of the affiliation between the respondent and OECTA and the tendency for occasional supply teachers to seek permanent employment (thereby moving from a bargaining unit represented by the respondent to a bargaining unit represented by OECTA) that there was a legal obligation upon Mr. Knott and OECTA to represent the complainant in his desire for a permanent position and his other complaints against the intervener. Counsel did not suggest the source for a legal obligation. The complainant was never represented by OECTA in a bargaining unit and no duty of representation is owed to the complainant by Mr. Knott or OECTA under section 68. The limited participation of Mr. Knott or OECTA in these issues whether directly or indirectly was entirely *ex gratia* in nature. It was also argued by counsel that Mr. Fredette's conduct towards the complainant's complaints was coloured by his desire not to lose a member of the respondent and that Mr. Fredette was content for the complainant to remain where he was as a member of the respondent. There was no evidence to support this contention. More-

over, in our view, the evidence does not support any such inference in the conduct of Mr. Fredette towards the complainant.

34. With respect to the fourth issue that the notice given for the general meeting on October 20, 1986 constituted a violation of section 72(5) and (6) of the Act. Section 72(5) and (6) of the Act provide as follows:

(5) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

Article 5 section 4 under the heading of Annual Meetings provides as follows:

Notice shall be given to the members at least 30 days prior to the convening of an Annual or General Meeting. Notice of the Annual or General Meeting shall set forth the time and place at which the meeting shall be held.

The Board has commented upon those subsections. In *RCA Limited* [1981] OLRB Rep. Aug. 1159 the Board stated at pages 1168 and 1169 as follows:

36. In Interpreting section 63(4) it is important to bear in mind its history and its limited purpose. There are a number of provisions in the Act respecting voting by employees, including representation votes in certifications, (ss. 7, 8), terminations (ss. 49, 51, 52) votes to resolve conflicting bargaining rights on the sale of a business (s. 55(8)) and the strike and ratification votes provided by sections 34(d) and 34(e). Section 63(4) is the only section in the Act in respect of votes conducted by a trade union. That reflects a clear legislative intention, consistent with the recommendations of the royal Commissions reviewed above, to avoid undue interference in internal trade union matters.

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39. The prevailing purpose of section 63(4) must be seen as providing a minimum of protection to employees to insure that the voting rights which they exercise in ratification and strike votes are unfettered by coercion, intimidation and undue influence. Strike and ratification votes can, as in the instant case, be hotly contested within a bargaining unit. In light of the history canvassed above, there can be little doubt that section 63(4) was specifically designed to eliminate the mischief of voice votes or votes by an open show of hands at union meetings called to resolve issues of strike or ratification. While abuses were not frequent. (see, *Woods Report*, Study No. 11, *supra*, pp. 149-150; *Anton*, *supra*, pp. 88-90), the section emphasizes the paramount interest in all cases of protecting the individual's right to vote secretly.

The clear legislative intention is to avoid undue interference in the internal affairs of a trade union. The purpose of what is now section 72(5) and (6) is to provide protection to employees and ensure that the voting rights which are exercised in strike votes and ratification votes are not abridged by coercion, intimidation or undue influence. The purpose and intent is to provide the employees with an entitlement to vote and an reasonable opportunity to vote.

35. On the facts in the instant case the Board is not prepared to say that the employees had an insufficient opportunity to cast a vote. There is only evidence with respect to the complainant and it appears that he had approximately two weeks' notice of the vote. No one complained about the constitutionality of the meeting or the vote. Indeed the indication is that the allegation of a violation under section 72(5) and (6) was an afterthought by the complainant since he did not raise it either at the meeting or within a reasonable period after the conclusion of the general meeting and the vote. The Board is not persuaded in the circumstances of this complaint and on the evidence

before it that it ought to intervene under this section. Such an intervention would, in our view, be tantamount to embarking on a close regulation of the internal affairs of the respondent. There is certainly no justification for such an endeavour by the Board. The complainant, of course, as a member of the respondent, may well have recourse under the constitution of the respondent. However, the Board concludes that the respondent has not violated section 72(5) and (6) of the *Labour Relations Act*.

36. For all the foregoing reasons the complaints in this matter are dismissed.

CONCURRING DECISION OF BOARD MEMBER D. A. PATTERSON; April 28, 1989

1. I concur with decision of the Board in this case.

2. I believe Mr. Rocca is in a very difficult situation and I feel for him. Leading up to June 1986 Mr. Rocca as the evidence shows worked, after June 1986 he was never called again. Mr. Rocca was also told he was no longer a suitable candidate for employment because he allegedly broke the School Board's rules and regulations.

3. Surely the intervener can tell Mr. Rocca what he allegedly has done wrong. By doing so, Mr. Rocca can attempt to right the wrong he allegedly is guilty of. This is 1989 and all citizens enjoy the benefits of laws and the Charter of Rights and *Freedom of Information Act* for the very reasons Mr. Rocca finds himself in front of this Board for.

4. Mr. Rocca has attempted to secure employment, perhaps his tactics aren't as polished or smooth as one would like but I do believe when you've been cut off from your professional career with no income or chance of employment you are driven more intensely to find out why.

5. I don't feel there is any remedy available to Mr. Rocca under the *Labour Relations Act* since his allegations against the respondent and intervener are without basis under the Act. I do believe there is some onus on the intervener to advise Mr. Rocca the reasons why he is not employable.

2367-88-R Labourers' International Union of North America, Local 607, Applicant v. Stebill Limited, Hemmin Mine Service Limited, Respondents

Construction Industry - Related Employer - One corporation performing concrete work on a bid basis primarily for the mining industry - Other corporation engaged in a much broader scope of work but it also does concrete work - One employer declaration made

BEFORE: Ken Petryshen, Vice-Chair, and Board Members J. Lear and S. Weslak.

APPEARANCES: L. Steinberg and P. Harris for the applicant; Gregory R. Birston and Julius Felkai for the respondents.

DECISION OF THE BOARD; April 28, 1989

1. The Board has before it two related applications, one made under section 63 and the

other under section 1(4) of the *Labour Relations Act*. At the beginning of his argument, counsel for the applicant advised the Board that his client no longer intended to pursue the application under section 63 of the Act. Accordingly, the application under section 63 of the Act alleging a sale of a business between the two respondents is hereby dismissed. The Board is left then with the application by Labourers' International Union of North America, Local 607 ("Local 607") which alleges that Stebill Limited ("Stebill") and Hemmin Mine Service Limited ("Hemmin") constitute one employer for the purposes of the Act.

2. Counsel for the respondents admitted at the outset that Stebill and Hemmin are under common control and direction. Mr. J. Felkai is the sole Officer and President of Stebill and he controls and directs Hemmin. Given the agreement of the parties on the issue of common control and direction, the Board is left to determine whether Stebill and Hemmin are engaged in associated or related activities or businesses and whether it should exercise its discretion to grant Local 607 the remedies it seeks. Felkai was the only witness to give evidence. In making its factual determinations, the Board has reviewed all of the oral and documentary evidence in addition to the parties' submissions relating thereto.

3. Between 1972 and 1980, Felkai owned and operated J. Felkai Construction Limited in the Sudbury area. This company did concrete and service work for the mining industry and it went into receivership in approximately 1980. From 1980 until 1984, Felkai worked as an employee for contractors who were involved in concrete and service work in the Sudbury area. Stebill was incorporated in December 1983 and in May 1984, Felkai moved to Heron Bay in order to obtain concrete and forming work for Stebill in the Hemlo area. Stebill did obtain such work and it employed persons, including construction labourers, from July 1984 until December 1984. A significant amount of the work it obtained during this period came from Ball Brothers Ltd. Since the latter company is a unionized contractor, Stebill signed a voluntary recognition agreement on August 2, 1984 with the Labourers covering "construction labourers, cement finishers and waterproofers" employed by Stebill.

4. The thrust of Felkai's evidence regarding Stebill was to demonstrate that Stebill was created in order to engage in large concrete jobs. Felkai testified that Stebill performed five jobs during the approximately six months it was in operation and all of the jobs were bid jobs. In other words, they were jobs for which Stebill competed with other contractors and which required some planning, particularly with respect to the labour requirements on each job. The two largest jobs Stebill obtained were from Ball Brothers Ltd. One job was pouring concrete floors for an administration building owned by Noranda and the other involved the pouring of a foundation for the mill area at the Lac Minerals site. These jobs required Stebill to complete its work within a specific time frame and required approximately eight to ten labourers. Stebill also performed three smaller jobs for Teck Corona. Stebill poured a small concrete slab for a foundation for a gatehouse. As part of a water supply system, it built three concrete piers. Stebill was also involved in filling in a 4' X 6' hole with concrete once certain piping had been installed. The sales journal for Stebill discloses that Stebill performed work for two other customers. These jobs were small and the customers, although not the mining companies in the area, were customers involved in servicing the mines. The sales journal for Stebill also discloses that work in addition to the contract with Ball Brothers Ltd., particularly on the Lac Minerals job, was performed by Stebill. Felkai indicated that smaller jobs consisting of work that "fell through the cracks" would arise and Stebill would perform the work and issue invoices for it.

5. It became apparent to Felkai that most of the sizeable concrete construction work had been completed at the mine sites and that Stebill was not in a position to compete in this field with the big firms. He observed that there was however a considerable amount of what he described as

service work available. This work involved any number of smaller jobs including clean-up work and smaller concrete jobs. The larger contractors were not interested in performing this type of work for a number of reasons not here relevant. Felkai incorporated Hemmin in November 1984 for the purposes of performing these smaller jobs for the mining companies. Hemmin began to operate at the beginning of 1985. None of Stebill's equipment was transferred to Hemmin nor did any of the employees who had worked for Stebill perform work for Hemmin. Hemmin has not bid on any job. Stebill has been dormant since the end of 1984.

6. A summary of the work orders of Hemmin was provided to the Board covering the years 1985 to 1989. We do not propose to set out in much detail the work performed by Hemmin in its first year of operation. During that year, Hemmin was engaged for the most part by Teck Corona in the performance of small jobs. In fact, for approximately eighteen months, Felkai would go to the Teck Corona site in the morning every day except Sunday in order to obtain some work for Hemmin. Hemmin agreed to an hourly rate with Teck Corona which approved time sheets for the work performed. Some of the equipment it utilized in the performance of the small jobs was shovels and concrete finishing tools. It is clear that in 1985 Hemmin was quite prepared to perform any work it was offered. It did a lot of work which was in the nature of clean-up work. It also did a significant amount of construction work involving concrete and other types of construction which normally is performed by construction labourers. For instance, in 1985, Hemmin installed a number of concrete pads for foundations, concrete curbs in the mill area and repaired concrete floors in the Teck Corona dry.

7. By the end of 1985, Hemmin began to work underground. Felkai estimates that at least by 1989, 90% of the volume of work performed by Hemmin was underground. Whereas in 1985 Hemmin had approximately four or five employees, it now employs over ninety people, most of whom work underground. The employees who work underground are not engaged in production mining. Rather, they are involved in building items such as lunchrooms, retaining walls, powder magazines and ventilation bulkheads. They are also involved in a lot of clean-up work underground. Hemmin now utilizes employees who normally work underground to perform the work that it is able to secure on the surface. If a surface job required one or two days of pouring concrete, Hemmin would bring up the men it required to the surface to perform the work. Hemmin also has three employees who are engaged in maintaining certain apartment buildings for the benefit of the mining companies.

8. Again, we do not propose to detail all of the surface work performed by Hemmin between 1986 and 1989. It primarily worked for the mining companies but it also performed work for private individuals and other companies. The nature of the surface work it performed for the mining companies during this period is similar to the sort of work it performed in 1985. In other words, it performed clean-up work as well as construction work of various sorts including concrete work. One of the most significant projects Hemmin undertook was for Lac Minerals in the latter part of 1988. Lac Minerals had contracted with Dineen Construction to perform certain work relating to the construction of a surface crusher system that involved two buildings, a crusher building and a screening plant. For reasons not here relevant, Dineen was unable to complete the job to Lac Minerals' satisfaction and Hemmin was requested to take over the job. Hemmin reluctantly agreed to do some of the work at an hourly rate. Since Dineen had finished only part of a pour, Hemmin attempted to complete the concrete work. Due to the cold weather, Hemmin was forced to leave the project and it is not expected that Hemmin will complete the job. This job for Lac Minerals was a fairly large job and the kind of job Stebill would have performed if it was still operating.

9. Counsel for the respondents began his submissions by again admitting that Stebill and

Hemmin are two separate entities under common control and direction. Counsel submitted that the evidence did not support the conclusion that Stebill and Hemmin carry on associated or related activities or businesses. In this regard, counsel noted that Stebill engaged only in concrete construction on a bid system basis. In counsel's view, Hemmin will do anything and the nature of the work it performs is considerably different from the work performed by Stebill. Counsel noted that Hemmin does not bid on jobs and the largest portion of its work is underground requiring the use of employee skills considerably different from the skills required of Stebill's employees. In counsel's view, the work performed by Stebill and Hemmin are sufficiently different that the Board should conclude that they do not carry on associated or related activities. Counsel also maintained that the Board should not exercise its discretion to grant Local 607 the relief it requests given the circumstances in this case.

10. Counsel for Local 607 noted during his submissions that Local 607 was not taking the position that it had rights to bargain for those engaged by Hemmin in underground work. The essence of Local 607's argument is that although Hemmin does much more work of a different nature than Stebill performed, nonetheless a portion of its work is construction work of the type performed by labourers. Counsel noted that a lot of the surface construction work Hemmin performs relates to cleaning construction sites and concrete work. Counsel submitted that Hemmin will perform whatever work it can obtain and made particular reference to the Lac Minerals job. It was argued that the fact that Hemmin took over this job from Dineen is an example of the similar nature of the work engaged in by Hemmin and Stebill.

11. The following paragraphs in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 set out the purpose and effect of section 1(4) of the *Labour Relations Act*.

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business-

ses between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [63] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

...

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneously economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

12. The following comment in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720 is also worth noting:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses"), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine*, *Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC 14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills. ...

13. Stebill was a company engaged in performing construction work, almost exclusively concrete work on a bid basis primarily for the mining industry in the Hemlo area. It performed a

small amount of its work for customers other than the mines located in the area. Although Felkai may have initially intended Stebill to engage in only larger concrete jobs, it is clear that Stebill was prepared to perform smaller jobs as well. In this regard, we are referring to the work Stebill did for Teck Corona, as well as the extra works it performed on certain contracts, particularly on the Lac Minerals job.

14. The evidence discloses that Hemmin started as a company with a small work force performing small jobs essentially for the mining industry and has developed into a fairly large operation. The majority of its work is performed underground and Local 607 has indicated that it is not claiming that this work be performed by its members. Hemmin is also engaged in maintaining residential facilities for mining companies. It is clear that the scope of the work performed by Hemmin is much broader than the work Stebill performed. Hemmin will perform whatever work it is able to obtain. It primarily services the mining industry but it has performed work for individuals and for companies other than the mining companies. Although the scope of its operation is broader than that of the short-lived Stebill, Hemmin does engage in work in the construction industry, including a significant portion of this work being concrete work. If one compares the work of Stebill and the surface work of Hemmin, one can only conclude that there is between them a considerable amount of similarity. Both engaged in construction activity involving concrete work. Stebill did perform some smaller concrete construction work while a significant portion of Hemmin's surface work is work of this type. Hemmin is also prepared to and did perform a larger construction project when it undertook to complete a stage of the Lac Minerals project relating to the crusher building and the screening plant. It is not surprising given the expertise of Felkai that Stebill and Hemmin would be engaged to some extent in work of a similar type. In reaching our conclusion regarding the work performed by Stebill and the surface work performed by Hemmin, the Board has considered the submissions of counsel for the respondents to the effect that the work is unrelated since Stebill bid for the work, could plan its activities and encountered time constraints whereas Hemmin's surface work generally arises on a day-to-day basis, has to be performed on a semi-urgent basis and is not bid on. In our view, these differences, although not irrelevant, would not lead one to conclude that the activities of the two respondents are unrelated. In determining whether activities are related, the Board primarily gives weight to the nature of the work being performed and the skills utilized by employees performing the work. In this case, Stebill and Hemmin both engaged in construction concrete work which construction labourers play a role in performing.

15. In determining whether entities are engaged in related activities, the Board has not concluded that the activities of the two entities must be identical. As noted earlier, the scope of the work engaged in by Hemmin is much broader than the work Stebill performed. But to the extent that Hemmin is engaged in construction work on the surface, especially when that work is concrete work, Hemmin is engaged in activities which are related to the activities of Stebill. The fact that Hemmin is engaging in very broad activities, some of which might be unrelated to the activities of Stebill, should not alter the way in which one characterizes those activities of Hemmin which are similar to those of Stebill. The mischief to which section 1(4) is directed requires such an approach in interpreting the words "related activities".

16. For the above reasons, the Board is satisfied on the evidence before it that Stebill and Hemmin are engaged in associated or related activities or businesses. The Board has considered the submissions of counsel for the respondents which were directed to persuading us that the Board should not exercise its discretion in favour of Local 607. The Board is satisfied that this is an appropriate case for it to exercise its discretion by granting Local 607 the relief it seeks. It is appropriate that the bargaining rights which Local 607 has for construction labourers for Stebill should be preserved when Hemmin is engaged in related construction activities requiring the employment of construction labourers. Accordingly, the Board hereby declares that Stebill and Hemmin consti-

tute one employer for the purposes of the *Labour Relations Act* and that Stebill and Hemmin are bound to the collective agreement between the Employer Bargaining Agency - Labourers' and Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council.

17. Subsequent to the hearing in this matter, counsel for Local 607 wrote to the Board in order to draw the panel's attention to *Warren Steeplejacks Limited*, *Warren Mechanical Limited*, *Blastico Corporation*. This decision was issued on March 15, 1989 and subsequent to the conclusion of the hearing in this matter. Counsel for the respondents took the position that the Board should not consider the case. We do not propose to set out the submissions of both counsel contained in their letters filed with the Board subsequent to the hearing. The Board simply notes that the conclusions it has made in this case were made without considering the Board's decision in *Warren Steeplejacks Limited*, *Warren Mechanical Limited*, *Blastico Corporation*.

2798-87-JD Sudbury Algoma Hospital, Complainant v. Ontario Nurses' Association and Ontario Public Service Employees Union, Respondents

Jurisdictional Dispute - Employer creating a new position of Registered Nurse - Alcohol and Addiction Program - Job filled within ONA bargaining unit - OPSEU claiming that the position should be assigned to its members - Complaint dismissed

BEFORE: *R. Herman*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *K. R. Valin*, *N. Huneault* and *F. Jones* for the complainant; *Mark J. Freiman*, *Paul Head*, *Jillian Welch* and *Carole Ann Priddle* for the respondent, Ontario Nurses' Association; *Terry D. McEwan* and *John Scott* for the respondent, Ontario Public Service Employees Union.

DECISION OF THE BOARD; April 7, 1989

1. This is a jurisdictional complaint filed pursuant to section 91 of the *Labour Relations Act*. The complainant hospital created a new position, Registered Nurse - Alcohol and Addiction Program, and posted and filled the job within the bargaining unit of the Ontario Nurses' Association (hereinafter "O.N.A."). The Ontario Public Service Employees Union (hereinafter "OPSEU") initially filed a grievance with respect to this posting, but the parties subsequently agreed that the instant complaint was a more appropriate mechanism for resolving their dispute. OPSEU claims that the work of this position, the work in dispute, should be assigned to its members. O.N.A. represents almost all registered nurses (R.N.'s) at the hospital. OPSEU represents, amongst others, paramedical employees and community psychiatric nurses (who are R.N.'s). Although only one position and its work was in dispute, in final submissions we were asked to make remedial directions directly affecting the community psychiatric nurses.

2. The relevant provisions of the Act are as follows:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a partic-

ular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

(2) The Board may in any direction made under subsection (1) provide that it shall be binding on the parties for other jobs then in existence or undertaken in the future in such geographic area as the Board considers advisable.

(15) The Board may in its discretion, or at any time following the release of its direction, alter the bargaining unit determined in a certificate or defined in a collective agreement as it considers proper, and the certificate or agreement, as the case may be, shall be deemed to have been altered accordingly.

(18) Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.

(19) Before disposing of an application under this section, the Board may make such inquiry, may require the production of such evidence and doing of such things, or may hold such representation votes, as it considers appropriate.

3. Sudbury Algoma Hospital is a psychiatric hospital located in Sudbury. It provides a wide range of services to patients, and one of its programs is an alcohol addiction program. The job in dispute was posted as an R.N. position in this alcohol addiction program. Prior to the creation of the R.N. position in the program, the staffing component of the addiction treatment service consisted of three people: the manager, a secretary and a social worker, John Scott. At that point in time, Scott was the primary provider of assessment and treatment services for the patients in the program. In many significant and fundamental respects Scott was a critical player in the creation and development of this program at the hospital. He was one of the original employees working in the program, and he played a key role in the metamorphosis of this program over the years.

4. The hospital applied for and received funding from the Ministry of Health to increase the staff component in this program by the hiring of a fourth employee. Because of its commitment to a multidisciplinary approach in the delivery of alcohol addiction services, an approach common to many facilities in the province, the hospital decided that the additional team member should be an R.N., as someone with an R.N.'s education and background would complement Scott's social work background, training, and abilities. This is the position in dispute.

5. After the employer decided that the position required a registered nurse, it then assessed both the O.N.A. and OPSEU collective agreements in order to determine under which agreement the position should be posted. The hospital concluded that the agreements demanded that the position be posted under the O.N.A. collective agreement, which it did. The recognition clause in the O.N.A. collective agreement reads as follows:

The Hospital recognizes the Association as the sole and exclusive bargaining agent for all Registered or Graduate Nurses employed by the Sudbury Algoma Hospital at Sudbury save and except Head Nurses and Supervisors, persons above the rank of Head Nurses and Supervisors, Health Nurse, Community Psychiatric Nurses, persons specifically excluded by the decisions of the Ontario Labour Relations Board dated November 25, 1970, and part-time employees.

Community psychiatric nurses, specifically excluded from the O.N.A. collective agreement as set out immediately above, are covered by the OPSEU paramedical bargaining unit by virtue of a Let-

ter of Agreement appended to that collective agreement. The unit itself is simply described as "all paramedical employees of the hospital at Sudbury..."

6. The facts as recited above were essentially undisputed. There was initially dispute concerning some other factual issues. In this respect, we note that the nature of OPSEU's claim changed after completion of the evidence. OPSEU initially asserted that the work in dispute was not a nursing position, but a paramedical one, falling within its collective agreement. The case on the merits was litigated on this basis. Presumably because of the evidence that was ultimately placed before the Board, in final submissions OPSEU agreed that an R.N. is required for the position in question. However, it conceded that the community psychiatric nurses whom it represents were not able to perform the job in question. OPSEU further conceded (again for the first time in final submissions) that as an R.N. is required, the collective agreements of O.N.A. and OPSEU mandated that the employer assign the work to O.N.A. Finally, OPSEU acknowledged that no employee in its paramedical bargaining unit was capable of performing the duties and responsibilities of the disputed position.

7. In OPSEU's submission, the majority of the duties and responsibilities involved in the position are not "nursing" duties, although an R.N. is needed to perform some of them. OPSEU submits these duties are of a psycho-social counselling or therapy nature. As the OPSEU paramedical bargaining unit consists of employees who provide such services, the Board ought to transfer from the O.N.A. bargaining unit to the OPSEU bargaining unit the R.N. position in question. Thus, OPSEU submitted that, although an R.N. is needed for the job, the job would more fairly and justly be given to OPSEU, whose paramedical members provide the psycho-social counselling and therapy that the job predominantly involves. OPSEU also submitted that no jobs would be lost to O.N.A. by this mechanism, precisely because there are no current employees in the OPSEU bargaining unit who can perform the duties of the job. If the Board were to transfer this R.N. position to the OPSEU collective agreement, the job would first have to be posted only for OPSEU members, and as no OPSEU member could successfully perform the job, it would then have to be opened to the hospital at large. In that case, OPSEU submitted, a current member from O.N.A. would no doubt be the successful candidate. Thus no current O.N.A. member would lose a job.

8. Returning to the facts, the Board finds that the evidence clearly substantiated that an R.N. is needed to perform the job in question. We are also satisfied that the duties and responsibilities of the job generally involve the performance of nursing work. Although one can fairly describe the majority of the duties and responsibilities as consisting of counselling and therapy in various forms, this position was created and an R.N. required for it specifically because the employer felt that a multidisciplinary approach to such counselling and therapy was warranted. Counselling and therapy are not the exclusive preserve of social workers or professionals of other disciplines, just as they are not the exclusive preserve of nurses. Although some of the services being provided may seem similar or identical from the patients' perspective, the different educational and work backgrounds brought to the task by an R.N. result in differentiation in the nature of the services provided. This is the very justification for the multidisciplinary approach. Only a few of the duties of the job legally require that an R.N. perform them, but nursing background and work experience are nevertheless valid requirements for the range of duties and responsibilities of the job; that is, to provide counselling, therapy, and related services from a nursing perspective. It is clear that ONA members are fully able to perform the duties of the job.

9. The employer assigned the work in question to the O.N.A. bargaining unit. O.N.A. represents all registered and graduate nurses, save specified exclusions not claimed by OPSEU to be entitled to the job. Although the duties of the job were largely, though as noted not exclusively,

nursing duties, the ONA recognition clause does not restrict O.N.A.'s representation of nurses to when they act or work "in a nursing capacity". To the contrary, O.N.A. has representative rights whenever an R.N. or graduate nurse is required for the job. An R.N. in the alcohol addiction treatment program would thus fall within the parameters of the O.N.A. scope clause, as the employer initially concluded. As an R.N. was required for this work, as O.N.A. represents R.N.'s, and as in any event no one in the O.P.S.E.U. bargaining unit is able to perform the job in question, we decline to interfere with the employer's assignment.

10. Also in final submissions, we were asked by O.N.A. and the hospital to issue a direction and make the necessary collective agreement amendments to transfer community psychiatric nurses from the OPSEU bargaining unit into the O.N.A. bargaining unit. The submissions of all three parties in effect accepted that the Board had the jurisdiction to make such an order. It was suggested that our jurisdiction to do so was found in the entire scheme set out in section 91, and more specifically in subsections (1), (15), and (18). We were asked to do so because it was submitted that such a direction would make labour relations sense, and would most likely reduce further jurisdictional disputes.

11. The assignment of work involving community psychiatric nurses was not the subject of any dispute in this proceeding, and therefore it is questionable whether we have jurisdiction to make a direction with respect to them. Their jobs were not clearly understood to be subject to potential remedial directions in this complaint, and it might well be of considerable surprise to them to discover that this Board had changed their bargaining agent without affording them any opportunity to participate in that decision or without canvassing their views in that respect. We therefore decline to make any directions in this respect.

12. Finally, an issue arose during the course of the proceedings over the continuing expansion and development of the addiction service at the hospital. As the hearings continued, the hospital received additional funding and was able to plan further expansion of the addiction service, including the proposed creation of new staffing positions. Several of these additional positions have been identified by the hospital as requiring R.N.s. The parties were unable to agree on a proposed expansion of the ambit of the case to deal with these additional R.N. positions. The Board ruled that this complaint would be restricted to the one position in question, and would not deal with the positions of any additional nurses in the proposed structure. The Board indicated that evidence could be adduced concerning the new structure and organization, and the duties and responsibilities of any of the new positions in that structure, but that it would not make directions with specific reference to the proposed positions. At the same time, the Board indicated that its decision might in any event effectively resolve any dispute over these additional positions. The Board's ruling was without prejudice to the right of any of the parties to file a new jurisdictional dispute with respect to any of these other positions. However, we would hope that our decision in this matter will render additional litigation unnecessary.

13. If any further jurisdictional complaints are filed, the parties will of course have to comply with the provisions of Rule 60 and Practice Note #15 (dated August 2, 1988). Any such further complaint will be dealt with according to the provisions applicable thereto, save that the Registrar will schedule the instant panel (if available) for any hearing on the merits, should a hearing on the merits be necessary.

14. For the reasons given, this complaint is hereby dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2488-82-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Aero Block & Precast Ltd., Kamet Enterprises Ltd. and 541190 Ontario Inc. (Respondents) v. The Form Work Council of Ontario (Intervener #1) v. Labourers' International Union of North America, Local 493 (Intervener #2)

Unit: "all carpenters and carpenters' apprentice in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

3457-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Milne & Nicholls Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener #1) v. Metropolitan Toronto Apartment Builders Association (Intervener #2)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3532-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Venture Industries Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Wallaceburg, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (137 employees in unit) (*Having regard to the agreement of the parties*)

3536-87-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. Royce Dupont Poultry Packers (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman and office staff" (54 employees in unit) (*Having regard to the agreement of the parties*)

1308-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Haydon Holding Ltd. c.o.b. as Hy's Steak House (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except department managers, persons above the rank of department manager, office and clerical staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (31 employees in unit)

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton regularly employed for not more than 24 hours per week and students employed during the school vacation period,

save and except department manager, persons above the rank of department manager and office and clerical staff" (9 employees in unit)

1825-88-R: Graphic Communications International Union, Local 500M (Applicant) v. The Sun Times Owen Sound, a Division of Southam Inc. (Respondent)

Unit #1: "all employees of the respondent at its newspaper in Owen Sound in its composing camera, plate making and press rooms regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant foremen, persons above the rank of assistant foreman, and employees for whom any trade union held bargaining rights as of October 31, 1988" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent at its newspaper in Owen Sound in its mailroom and delivery, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, persons under contract with the Adult Rehabilitation Centre and employees for whom any trade union held bargaining rights as of October 31, 1988" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #3: "all employees of the respondent at its newspaper in Owen Sound in its mailroom and delivery regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, persons under contract with the Adult Rehabilitation Centre and employees for whom any trade union held bargaining rights as of October 31, 1988" (33 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2007-88-R: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Hillview Farms Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Norwich Township, save and except supervisor, persons above the rank of supervisor, office, clerical, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods" (45 employees in unit) (*Having regard to the agreement of the parties*)

2020-88-R: Labourers' International Union of North America, Local 607 (Applicant) v. Kraft Construction company (1978) Ltd. (Respondent)

Unit: "all labourers and labourers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all labourers and labourers' apprentices in the employ of the respondent in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2046-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Atlas Aluminium (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2086-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Canadian Star Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2141-88-R: Canadian Union of Public Employees (Applicant) v. University Settlement Recreation Centre (Respondent)

Unit #1: “all employees of the respondent in Metropolitan Toronto, save and except supervisors/co-ordinators, those above the rank of supervisor/co-ordinator, executive secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (32 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

2171-88-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Les Montages D’Acier P.B. Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction in the Province of Ontario and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

2194-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Chrysalis Restaurant Enterprises Inc. (Respondent)

Unit: “all employees of the respondent at its Bemelmans Restaurant in the Municipality of Metropolitan Toronto, save and except operations manager, persons above the rank of operations manager, head chef, accounting staff and students employed during the school vacation period” (58 employees in unit) (*Having regard to the agreement of the parties*)

2272-88-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Ltd. (Respondent)

Unit: “all employees of the respondent at its retirement lodge(s) in Cambridge, save and except professional medical staff, registered and graduate nurses, activity director, supervisors, persons above the rank of supervisor, office staff, and students employed during the school vacation period” (17 employees in unit) (*Having regard to the agreement of the parties*)

2276-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Pioneer Mechanical Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

2296-88-R: United Food & Commercial Workers International Union, Local 633, AFL:CIO:CLC (Applicant) v. Roth - Juschka Holdings Ltd. (Respondent)

Unit: “all employees of the respondent in the Township of Moore, employed in the Meat Department, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

2298-88-R: Ontario Nurses’ Association (Applicant) v. St. Vincent de Paul Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at Brockville,

save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than 24 hours per week" (33 employees in unit)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

2559-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Valerio Construction (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2576-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cobra Drain & Development Corp. (Respondent) v. International Union of Operating Engineers, Local 739 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2604-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Al's Landscape Contracting Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2610-88-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. Carewell Corporation c.o.b. Bracebridge Villa (Respondent)

Unit #1: "all employees of the respondent in Bracebridge, Ontario, save and except Assistant Manager, persons above the rank of Assistant Manager, office and clerical staff, registered and graduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent Bracebridge, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Assistant Manager, persons above the rank of Assistant Manager, office and clerical staff and registered and graduate nurses" (7 employees in unit) (*Having regard to the agreement of the parties*)

2619-88-R: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. MBF Electrical Products Inc. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office staff, plant clerical, sales staff, technical staff, engineering staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (48 employees in unit) (*Having regard to the agreement of the parties*)

2624-88-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local No. 647 (Applicant) v. Humpty Dumpty Foods Ltd. (Respondent) v. Retail, Wholesale, Bakery & Confectionery Workers' Union, Local 461 of the Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Intervener)

Unit: "all office and clerical employees of the respondent in the City of Brampton, save and except supervisors, those persons above the rank of supervisor, statistician, confidential secretary to the General Manager and Sales Manager, confidential secretary to the District Sales Managers and the Controller, plant nurse, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in any bargaining unit for which a trade union held bargaining rights as of January 23, 1989" (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2635-88-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 697235 Ontario Ltd. c.o.b. as Northview Electrical Contractors (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2688-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Niakwa Construction Ltd. (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, employees engaged as surveyors and construction labourers in the District of Kenora including the Patricia Portion but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

2720-88-R: United Steelworkers of America (Applicant) v. Halo of Canada Lighting Inc. (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all employees of Halo of Canada Lighting Inc. working at Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and sales staff" (124 employees in unit) (*Having regard to the agreement of the parties*)

2761-88-R: Service Employees Local 210 affiliated with the Service Employees International Union, AFL:CIO:CLC (Applicant) v. Dresden Two Inc. (Respondent)

Unit #1: "all employees of the respondent in the Town of Dresden, save and except supervisors, persons above the rank of supervisor, registered and graduate nurse, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Town of Dresden regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

2768-88-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC (Applicant) v. Furst International Corporation (Respondent)

Unit: "all employees of the respondent in the City of Welland, save and except foremen, persons above the rank of foreman, office and clerical staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

2773-88-R: Office & Professional Employees International Union (Applicant) v. Crisis Homes Inc. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except the co-ordinator and persons above the rank of co-ordinator" (17 employees in unit) (*Having regard to the agreement of the parties*)

2780-88-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Victoria Hospital Corporation (Respondent)

Unit: "all registered nursing assistants employed by the respondent in the City of London regularly employed for not more than (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, undergraduate dietitians, persons engaged in research work, social workers, technical personnel, chief engineer, assistant chief engineer, resident director, security guards, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of February 6, 1989" (68 employees in unit) (*Having regard to the agreement of the parties*)

2781-88-R: International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Santiag's Old Country Painting & Decorating (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2782-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Intercorp Mechanical Contracting Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2799-88-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Brown's Automatic Vending (1975) Ltd. (Respondent)

Unit: "all employees of the respondent in the Dupont Canada Inc. cafeteria in the Township of Kingston, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

2800-88-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent in its vending services division at Kingston, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of February 9, 1989" (3 employees in unit) (*Having regard to the agreement of the parties*)

2803-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Carey's Restaurants (Dundas) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 120 King Street West, Dundas, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

2806-88-R: Service Employees' Union, Local 210 affiliated with the Service Employees' International Union, AFL:CIO:CLC (Applicant) v. The Corporation of the Township of Amabel (Respondent)

Unit #1: "all employees of the respondent in the Township of Amabel save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of February 8, 1989" (11 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (See *Applications for Certification Withdrawn*)

2814-88-R: United Steelworkers of America (Applicant) v. 485594 Ontario Inc., c.o.b. as Service Steel (Respondent)

Unit: "all employees of the respondent in the City of Cambridge, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (22 employees in unit) (*Having regard to the agreement of the parties*)

2822-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Century Fence Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2831-88-R: United Steelworkers of America (Applicant) v. Birth Control & Venereal Disease Information Centre, Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the Board of Directors and persons above the rank of the Board of Directors" (5 employees in unit) (*Having regard to the agreement of the parties*)

2832-88-R: United Steelworkers of America (Applicant) v. Immigrant Women's Health Centre Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the Board of Directors, persons above the rank of the Board of Directors" (9 employees in unit) (*Having regard to the agreement of the parties*)

2839-88-R: Ontario Nurses' Association (Applicant) v. Regional Municipality of Peel (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity at Vera M. Davis Community Care Centre in the Town of Bolton, save and except Director of Care and persons above the rank of Director of Care" (17 employees in unit) (*Having regard to the agreement of the parties*)

2845-88-R: Canadian Union of Public Employees (Applicant) v. The Lincoln County Humane Society (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Lincoln County who are regularly employed for not more than 24

hours per week and students employed during the school vacation period, save and except inspectors, managers, persons above the rank of inspector or manager, and persons for whom any trade union held bargaining rights as of February 14, 1989" (5 employees in unit)

2850-88-R: Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Highcrest Properties (London) Ltd. (Respondent)

Unit: "all employees of the respondent in the County of Middlesex, save and except foremen, persons above the rank of foreman, office and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

2853-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Woodbridge Foam Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its General Foam & Cushion Division in Brampton, save and except foremen, persons above the rank of foreman, office, clerical, sales and technical staff" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2858-88-R: Oilburner Servicemen's Association (Applicant) v. Shell Canada Products Ltd. (Respondent)

Unit: "all oil burner service contractors employed by the respondent working in and out of the Regional Municipality of Ottawa-Carleton" (4 employees in unit) (*Having regard to the agreement of the parties*)

2866-88-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Beatrice Foods Inc. (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Thunder Bay in its Klomp-Wakefield Division, save and except supervisors, persons above the rank of supervisor, confidential secretary to the General Manager, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

2867-88-R: Ontario Public Service Employees Union (Applicant) v. Durhamcrest Inc. (Respondent)

Unit: "all employees of the respondent in the City of Oshawa, save and except Assistant Director, persons above the rank of Assistant Director and Secretary/Bookkeeper" (9 employees in unit) (*Having regard to the agreement of the parties*)

2876-88-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Leisure World Inc. (Respondent)

Unit: "all employees of the respondent at Markham Suites Hotel in the Town of Markham, save and except supervisors, persons above the rank of supervisor, office and sales staff, accounting staff and security guards" (36 employees in unit) (*Having regard to the agreement of the parties*)

2881-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Simpsons Ltd. (Respondent)

Unit: "all employees of the respondent at 5601 Steeles Avenue West in the Municipality of Metropolitan Toronto, save and except security staff, department supervisors, persons above the rank of department supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

2882-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Plate-Way Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

2884-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mar Tek Contracting (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2904-88-R: IWA - Canada (Applicant) v. Allin Cable Reels (1984) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Bowmanville, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (46 employees in unit) (*Having regard to the agreement of the parties*)

2910-88-R: Canadian Union of Public Employees (Applicant) v. Alladin Day Care Centre Inc. (Respondent)

Unit: "all employees of the respondent in the City of Guelph, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

2936-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. Gabby Properties Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2937-88-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. The Corporation of the Township of Sombra (Respondent)

Unit: "all employees of the respondent in the Township of Sombra, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

2940-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. A. Lamothe Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those engaged as surveyors in the employ of the respondent in the industrial, commercial and institutional sector of the construction in the Province of Ontario and in all other sectors of the construction in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2950-88-R: Ironworkers District Council of Ontario (Applicant) v. Silverwood Enterprises Ltd. (Respondent)

Unit: "all rodmen and rodmen apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Dur-

ham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2972-88-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Artex Painting & Contracting Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3031-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. L.N.L. Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3078-88-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Garbo Construction (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2546-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Square D Canada Electrical Equipment Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 2345 (Intervener)

Unit: "all employees of the respondent in the City of Stratford, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, time study men, methods men, engineers, Quality Control technicians, laboratory technicians and nurses" (166 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	170
Number of persons who cast ballots	149
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	47
Number of segregated ballots cast by persons whose names do appear on voters' list	2
Number of ballots marked in favour of applicant	104
Number of ballots marked in favour of intervener	45

2677-88-R: United Steelworkers of America (Applicant) v. Wilfred Karlton Furniture Company Inc. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of the respondent in its Strathroy Furniture Division in the Town of Strathroy, save and except forepersons, persons above the rank of foreperson, office and sales staff, technical personnel and stu-

dents employed during the school vacation period” (159 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	157
Number of persons who cast ballots	148
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	95
Number of ballots marked in favour of intervener	51

2776-88-R: Independent Canadian Transit Union (Applicant) v. Elisabeth-Bruyere Health Centre (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: “all maintenance mechanics and other employees employed at the power plant of the Elisabeth Bruyere Health Centre, save and except foreman and supervisors, persons with a rank equivalent to and superior to foreman and supervisors, office and clerical staff, technical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which the Canadian Union of Public Employees, the Ontario Public Service Employees’ Union and the Ontario Nurses’ Association held bargaining rights as of February 4, 1989” (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

2777-88-R: Independent Canadian Transit Union (Applicant) v. Ottawa General Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: “all Building Control Centre Operators (B.C.C.) and Building Equipment Operators (B.E.O.) responsible for the operation of environment control equipment employed by the Ottawa General Hospital in the City of Ottawa, save and except foremen and supervisors, persons with a rank equivalent to and superior to foremen and supervisors, office and clerical staff, technical staff, and employees in bargaining units for which the Canadian Union of Public Employees, the Ontario Public Service Employees’ Union and the Ontario Nurse’ Association held bargaining rights as of February 4, 1989” (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2100-88-R: Service Employees’ International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Canadian Red Cross Society (Respondent)

Unit: “all employees of The Canadian Red Cross Society in Brantford, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons for which any trade union held bargaining rights as of November 29, 1988” (186 employees in unit)

Number of names of persons on revised voters’ list	180
Number of persons who cast ballots	144
Number of ballots marked in favour of applicant	90
Number of ballots marked against applicant	54

2141-88-R: Canadian Union of Public Employees (Applicant) v. University Settlement Recreation Centre (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in Metropolitan Toronto, save and except supervisors/co-ordinators and those above the rank of supervisor/co-ordinator" (40 employees in unit)

Number of names of persons on list as originally prepared by employer	39
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	5

2298-88-R: Ontario Nurses' Association (Applicant) v. St.. Vincent de Paul Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: (See *Bargaining Agents Certified Without Vote*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Brockville regularly employed for not more than 24 hours per week, save and except head nurses and persons above the rank of head nurse" (32 employees in unit)

Number of names of persons on list as originally prepared by employer	33
Number of persons who cast ballots	23
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

2115-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. U-Need-A Cab Ltd. (Respondent) v. Group of Employees (Objectors)

2755-88-R: Ontario Nurses' Association (Applicant) v. Belleville General Hospital (Respondent)

2835-88-R: Canadian Union of Public Employees (Applicant) v. Durham Recycling Centre Inc. (Respondent)

2836-88-R: Niagara Health Care & Service Workers Union, Local 302 Affiliated with the Christian Labour Association of Canada (Applicant) v. Heritage Living Canada Inc. (Respondent) v. Group of Employees (Objectors)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1672-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. J. Weber Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the County of Wellington engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	8

2122-88-R: United Steelworkers of America (Applicant) v. WCA Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Ingersoll, save and except forepersons, persons above the rank of

foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (142 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	149
Number of persons who cast ballots	144
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	98

2247-88-R: Canadian Union of Public Employees (Applicant) v. Oshawa & District Association for Community Living (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Durham employed in its supported independent living services, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of December 12, 1988” (14 employees in unit)

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	10

2386-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hoover Universal (Canada) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Tillsonburg, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period or on a cooperative training basis with a school, college or university, and security guards” (415 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	378
Number of persons who cast ballots	345
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	164
Number of ballots marked against applicant	179

Applications for Certification Withdrawn

0127-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Jermark Plumbing & Mechanical Services Ltd. (Respondent)

0384-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Toddglen Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

0688-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. The Sudbury Board of Education (Respondent) v. Canadian Union of Public Employees (Intervener)

1739-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ledcor Industries Ltd. (Respondent)

2084-88-R: Labourers' International Union of North America, Local 527-527A (Applicant) v. Novel Masonry Ltd. (Respondent)

2290-88-R: The Employees Association of St. Lawrence & District Ambulance Services (Applicant) v. St. Lawrence & District Ambulance Services 520212 Ontario Ltd. (Respondent)

2760-88-R: Service Employees Local 210 affiliated with the Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Lumberjack Restaurant (Respondent)

2767-88-R: Amalgamated Transit Union, Local 1320 (Applicant) v. The Corporation of the City of Peterborough (Respondent)

2779-88-R: Independent Canadian Transit Union (Applicant) v. Winchester District Memorial Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

2783-88-R: Canadian Union of Public Employees (Applicant) v. Bruce-Grey Roman Catholic Separate School Board (Respondent)

2789-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cobra Drain & Development Corp. (Respondent)

2790-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Snap On Tools of Canada Ltd. (Respondent)

2805-88-R: Service Employees Union, Local 210 affiliated with Service Employee's International Union, AFL:CIO:CLC (Applicant) v. Peace Bridge Customs Brokers (Respondent)

2806-88-R: Service Employees' Union, Local 210 Affiliated with the Service Employees' International Union, AFL:CIO:CLC (Applicant) v. The Corporation of the Township of Amabel (Respondent) (Bargaining Unit #2 -Withdrawn)

2877-88-R; 2878-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Oakes Mechanical Contracting Ltd. (Respondent)

2880-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Argcen Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2971-88-FC: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Wood Trim Carpentry Co. (Respondent) (*Granted*)

2986-88-FC: United Steelworkers of America (Applicant) v. Allan & Marion Super Discount Marts Ltd. (Respondent) (*Dismissed*)

3139-88-FC: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Unidoor Company Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2571-87-R: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Warren Steeplejacks Ltd., Warren Mechanical Ltd., Blastco Corporation (Respondents) (*Dismissed*)

0013-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. J.E.T. Contracting Ltd. and F. Mohr Construction Inc. (Respondents) (*Granted*)

1387-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Claron Construction

Ltd. 649351 Ontario Inc., Claron Construction, Aaro Sewer & Water and Registered Construction Inc. (Respondents) (*Dismissed*)

1687-88-R: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Richardson Brothers Insulation Co. Ltd. and/or Lincoln Insulating Ltd. and/or Lincoln Insulation Ltd. and James Michael Richardson c.o.b. as Hi-Lo Insulating (Respondents) v. Construction Workers, Local 150, Affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

1898-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. DFD Steel Industries Ltd. Paron Metal Fabricating Inc. (Respondent) v. Group of Employees (Objectors) (*Granted*)

2213-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 663 (Applicant) v. The Productivity Group Inc. and Tri-Fab Mechanical & Associates Ltd. (Respondents) (*Withdrawn*)

2422-88-R; 2433-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mardave Construction Ltd.; Melglo Landscaping Corp. (Respondents) (*Granted*)

SALE OF A BUSINESS

2571-87-R: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Warren Steeplejacks Ltd., Warren Mechanical Ltd., Blastco Corporation (Respondents) (*Dismissed*)

0013-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. J.E.T. Contracting Ltd. and F. Mohr Construction Inc. (Respondents) (*Granted*)

1387-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Claron Construction Ltd. 649351 Ontario Inc., Claron Construction, Aaro Sewer & Water and Registered Construction Inc. (Respondents) (*Dismissed*)

1687-88-R: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Richardson Brothers Insulation Co. Ltd. and/or Lincoln Insulating Ltd. and/or Lincoln Insulation Ltd. and James Michael Richardson c.o.b. as Hi-Lo Insulating (Respondents) v. Construction Workers, Local 150, Affiliated with the Christian Labour Association of Canada (Intervener) (*Withdrawn*)

1898-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. DFD Steel Industries Ltd. Paron Metal Fabricating Inc. (Respondent) v. Group of Employees (Objectors) (*Granted*)

2213-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 663 (Applicant) v. The Productivity Group Inc. and Tri-Fab Mechanical & Associates Ltd. (Respondents) (*Withdrawn*)

2422-88-R; 2433-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mardave Construction Ltd.; Melglo Landscaping Corp. (Respondents) (*Granted*)

2718-88-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC, and its Local 994 (Applicant) v. Par-Rite Services Ltd. (o/a The Great Canadian Soup Company) (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0757-88-R: Gilles Delage (Applicant) v. Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261 (Respondent) v. Real Delage, King George Hotel (Intervener)

Unit: "all employees of the intervener in Cornwall, Ontario, save and except manager, and persons above the rank of manager" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*) (*Granted*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

1485-88-R: Fulltime Housekeeping Staff of Journey's End Motels Kanata (Applicant) v. Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261 (Respondent) v. 547691 Ontario Ltd. c.o.b. as Journey's End Motels (Intervener)

Unit: "all employees employed at the employer's Motel at 222 Hearst Way, Kanata, save and except head housekeeper, persons above the rank of head housekeeper, front desk clerks, persons regularly employed for not more than 24 hours per week, students and security personnel" (11 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

1598-88-R: Marlene Mestroni (Applicant) v. Canadian Union of Public Employees, Local 1717 (Respondent) (*Withdrawn*)

2022-88-R: Michael Falls & Wayne Kerslake (Applicants) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 141, Warehousemen & Miscellaneous Drivers (Respondent) v. Argcen Inc. (Intervener) (16 employees in unit) (*Dismissed*)

2192-88-R: Robert Fitzsimmons & Robert Anthes and Employees of the Corporation of the City of London (Applicant) v. Canadian Union of Public Employees, Local 739 (Respondent) v. The Corporation of the City of London (Intervener)

Unit: "all employees of the Works Division who are classified as foreman or general foreman under position classifications WF1 to WF4, inclusive, as set out in schedule 'A' to the collective agreement" (23 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	21
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	20

2263-88-R: Fred Dawson (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

2543-88-R: Lou LaFrance (Applicant) v. United Steelworkers of America, Local 2729 and United Steelworkers of America (Respondents) v. Aluminor Ltd. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Aluminor Limited at 180 Commander Boulevard and 335 Finchdene Square in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, field installers and students employed during the school vacation period" (47 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	46
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Number of persons who cast ballots	40
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	39
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	25
Number of ballots marked against respondent	14
Ballots segregated and not counted	1

2599-88-R: Robert Sharp (Applicant) v. United Food & Commercial Workers International Union, Local 633 (Respondent) v. Morrisson's Meat Packers Ltd. (Intervener) v. Group of Employees (Objectors) (23 employees in unit) (*Dismissed*)

2608-88-R: Darryl McQueen on behalf of the employees of Space Saver Hoist Co. (Applicant) v. United Steelworkers of America (Respondent) v. Space Saver Hoist Co. (Intervener) (10 employees in unit) (*Granted*)

2625-88-R: Monica Pottinger (Applicant) v. United Steel Workers (Respondent) v. Temple Wire Products Ltd. (Intervener) (33 employees in unit) (*Dismissed*)

2705-88-R: Franco E. Filosa (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) (3 employees in unit) (*Dismissed*)

2708-88-R: Employees of Gamble Bus & Construction Co. Ltd. (Applicant) v. International Union of Operating Engineers, Local 793, Pat Maly Rep. (Respondent) (*Withdrawn*)

2723-88-R: Brian A. Moffat, Tim N. Eales, Tanya Newton, Sharon L. Davis, Leonard R. Whatman and Andrew A. Gaskell (Applicants) v. United Electrical, Radio & Machine Workers of Canada (Respondent) v. Wakeford Automatics (Peterborough) Ltd. (Intervener) (12 employees in unit) (*Granted*)

2788-88-R: Georges Pilon (Applicant) v. Retail, Wholesale & Department Store Union, Local 440 (Respondent) v. J. M. Vinette Ltd. (Intervener) (7 employees in unit) (*Granted*)

2826-88-R: Matthew Kenny & Jaques Hurtubise (Applicants) v. Teamsters, Chauffeur, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Graham G. Bowyer Inc. (Intervener) (22 employees in unit) (*Granted*)

2905-88-R: Ruth Poole (Applicant) v. United Steelworkers of America (Respondent) v. West Bend of Canada (Intervener) (3 employees in unit) (*Granted*)

2907-88-R: Lorraine Bolohan (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), and its Local 240, successor to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., and its Technical, Office & professional (T.O.P.), Local 240, U.A.W. (Respondent) v. National Auto Radiator Mfg. Co. Ltd. (Intervener) (6 employees in unit) (*Granted*)

2944-88-R: David Braden (Applicant) v. Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Respondent) (*Withdrawn*)

2945-88-R: Graham Marshall (Applicant) v. The United Steelworkers of America (Respondent) (*Withdrawn*)

2984-88-R: Angelo Fedele (Applicant) v. United Steel Workers of America (Respondent) v. Miller Fluid Power (Canada) Ltd. (Intervener) (14 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3035-88-U: Council of Printing Industries of Canada on behalf of Photo Engravers & Elctrotypers Ltd. (Applicant) v. Graphic Communications International Union , Local 500M (Lithographers) and those persons shown on Schedules "A" & "B" (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2354-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 303 (Applicant) v. Del Equipment Ltd., Del Hydraulics Ltd. & Edinburgh Electric Ltd. (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3569-86-U: The Sault Ste. Marie Typographical Union, No. 746 (Complainant) v. The Sault Star, A Division of Southam Inc. (Respondent) (*Dismissed*)

0041-87-U: The Lumber & Sawmill Workers' Union, Local 2693 (Complainant) v. McKenzie Forest Products Inc. (Respondent) (*Withdrawn*)

2881-87-U: United Steelworkers of America (Complainant) v. Renfrew Tape Ltd. (Respondent) (*Dismissed*)

0351-88-U: Peter Lysak (Complainant) v. NCR Canada Ltd. (Respondent) (*Dismissed*)

0765-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. Toddglen Construction Ltd. and Labourers' International Union of North America, Local 183 (Respondents) (*Withdrawn*)

1233-88-U: Canadian Paperworkers Union, (Complainant) v. Easy-Plan Industries Ltd., 312211 Ontario Ltd. and Fournier Stands Mfg. of Canada Ltd. (Respondents) (*Withdrawn*)

1321-88-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Todd Ramsay Interiors and James R. Todd (Respondents) (*Dismissed*)

1505-88-U: Andrew M. George (Complainant) v. General Motors of Canada Ltd. and John Graham & Glen Gray and National Automobile & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondents) (*Withdrawn*)

1550-88-U: Gary Boyle (Complainant) v. United Steelworkers of America, Local 2551 (Respondent) v. The Algoma Steel Corporation Ltd. (Intervener) (*Dismissed*)

1567-88-U: United Steelworkers of America (Complainant) v. Random House of Canada Ltd. (Respondent) (*Withdrawn*)

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1701-88-U: Stephen Morvay (Complainant) v. Hotel & Restaurant Employees' & Bartenders' International Union (Respondent) v. The Ontario Jockey Club (Intervener) (*Withdrawn*)

1718-88-U: Andrew M. George (Complainant) v. John Graham, Glen Gray, National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and General of Motors Canada Ltd. (Respondents) (*Withdrawn*)

1908-88-U: Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers and its Local 576 (Complainants) v. Hamilton Automatic Vending Company Ltd. (Respondent) (*Granted*)

1924-88-U: Salvatore Augello Todino (Applicant) v. Canadian Union of Public Employees, Local 133 (Respondent) v. The Corporation of the City of Niagara Falls (Intervener) (*Dismissed*)

1984-88-U: Steve Babanics (Complainant) v. 'Freuhauf Canada, A Division of the Brantford Group of Companies' (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 252 (Intervener) (*Dismissed*)

2006-88-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Maple Leaf Petroleum Ltd. c.o.b. as Mr. Lube (Respondent) (*Dismissed*)

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2167-88-U: Service Employees International Union, Local 204 (Complainant) v. Glebe Rest Home Ltd., c.o.b. as Glebe Manor (Respondent) (*Withdrawn*)

2168-88-U: United Steelworkers of America (Complainant) v. Random House of Canada Ltd. (Respondent) (*Withdrawn*)

2268-88-U: International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. The Hotel Selby (Respondent) (*Dismissed*)

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2426-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Niagara Machine Products (Respondent) (*Withdrawn*)

2428-88-U: Marilee Reimer (Complainant) v. Dr. Bernadette Schell, President, Laurentian University Faculty Association; Laurentian University (Respondents) (*Withdrawn*)

2538-88-U: United Steelworkers of America (Complainant) v. Canada Cement Lafarge Ltd. (Concrete Pipe Company Division) (Respondent) (*Withdrawn*)

2554-88-U: Gary Devine (Complainant) v. Ontario Taxi Union - Local 1688 - R.W.D.S.U., AFL:CIO:CLC and The Blue Line Taxi Unit, its Executive Board & union representatives (Respondents) (*Dismissed*)

2569-88-U: International Association of Machinists & Aerospace Workers District Lodge 717, Aeronautical Lodge 717 Turbo (Complainant) v. Hawker Siddeley Canada Inc. (Orenda) Division (Respondent) (*Withdrawn*)

2594-88-U: Kevin Coulter (Complainant) v. Jas F. Gillanders Company Ltd. (Respondent) (*Withdrawn*)

2603-88-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Hill-view Farms Ltd. (Respondent) (*Withdrawn*)

2630-88-U: Peter S. Magill of Barrie Ambulance Dept. (Complainant) v. Service employees Int. Union, Local 204 (Respondent) v. The Royal Victoria Hospital of Barrie (Intervener) (*Withdrawn*)

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2651-88-U: United Steelworkers of America (Complainant) v. Northern Devices Inc., A Leviton Company (Respondent) (*Withdrawn*)

2658-88-U: Canadian Paperworkers Union, Local 321 (Complainant) v. Boise Cascade Ltd. (Studmill) (Respondent) (*Withdrawn*)

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2713-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 732118 Ontario Inc. c.o.b. as Nortown I.G.A. (Respondent) (*Withdrawn*)

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3473-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Lackie Industrial Contractors Ltd. (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Intervener) (*Granted*)

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2890-88-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. L. R. Bigras Holdings Ltd. (Respondent) (*Granted*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS



May 1989



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**A Monthly Series of Decisions from the
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- BRIECAN CONST. LIMITED; RE U.A., LOCAL 800 417
- Certification - Bargaining Unit - Pre-Hearing Vote - Related Employer - Union seeking to represent a unit of drivers and owner-operators working "under the banner" of the respondent airline limousine companies - Three of named respondents declared one employer - Request to exclude part-time employees and students rejected - Allegations of voting day and membership irregularities dismissed - Board not ruling on the merits of the argument that non-driving brokers should be declared one employer with the named respondents - Certificates issuing
- AIRLINE LIMOUSINE SERVICES LIMITED, MCDONNELL-RONALD LIMOUSINE SERVICE LIMITED OPERATING AS; RE TEAMSTERS UNION, LOCAL 938; RE MCINTOSH LIMOUSINE SERVICE LIMITED; RE AIRLIFT LIMOUSINE SERVICES LIMITED; RE AIR CAB LIMOUSINE SERVICES (1985) LIMITED; RE AAROPORT LIMOUSINE SERVICES LTD. 395
- Certification - Construction Industry - Pre-Hearing Vote - Respondent failing to meet with officer to make voting arrangements or to file any lists of employees - Intervener arguing that the list should not be finalized in the absence of the respondent and the respondent's records -

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Board refusing to convene a hearing on the issue - Vote ordered on the basis of the records of the applicant and available information - Ballot box sealed

VICTOR CARPENTRY LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27.....

524

Certification - Evidence - Membership Evidence - Nature of inquiries made by Form 9 Declarant were such that the Form 9 was unsatisfactory - Declaration cannot be based on the assumption that a collector has carried out prior instructions or on an examination of the membership cards - Recall of collector as witness to establish that each applicant for membership had personally paid a dollar not permitted - Application dismissed

ESTONIAN RELIEF COMMITTEE IN CANADA; RE S.E.I.U., LOCAL 204, AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES

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Certification - Practice and Procedure - Pre-Hearing Vote - Parties developing an alternative dispute resolution procedure to deal with 650 list challenges - Procedure submitted to the Board for its approval - Board approving of appointment of Vice-Chair under s.103(2)(h) to hear evidence and report back to the panel which will then make decisions based on the report - Rulings made by Vice-Chair are deemed to be the parties' settlements - Vice-Chair intended to be a dispute settling mechanism of "last resort"

TORONTO, GOVERNING COUNCIL OF THE UNIVERSITY OF; RE C.U.P.E.; RE GROUP OF EMPLOYEES

521

Certification - Practice and Procedure - Trade Union Status - Applicant notified that it had not been found to be a trade union under the name in which it had applied - Applicant requesting that its name on the application be amended - Board satisfied that applicant had made a *bona fide* mistake - Amendment permitted - No hearing necessary - Vote ordered

BLUE BELL CANADA INCORPORATED; RE A.C.T.W.U.; RE GROUP OF EMPLOYEES

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Certification Where Act Contravened - Change in Working Conditions - Interference in Trade Unions - Unfair Labour Practice - Union alleging that employer failed to give its usual annual wage increase during the freeze - Reasonable expectations of employees contain an objective element - No breach of freeze - No interference with trade union - Ballots cast in representation vote ordered counted

COCA-COLA LTD.; RE U.F.C.W.; RE GROUP OF EMPLOYEES

427

Certification Where Act Contravened - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Employer breaching Act by asking employees who had joined the union - Statements made at captive audience meeting breach of Act - Employer not meeting onus of demonstrating that it did not lay off employees because of the organizing campaign - Names of employees who were laid off contrary to the Act included on the list of employees - Certificates issuing - Unnecessary to determine s.8

RAINSOON METAL SYSTEMS INCORPORATED; RE S.M.W., LOCAL 30.....

482

Certification Where Act Contravened - Evidence - Membership Evidence - Unfair Labour Practice - Evidence of witness who was not subject to full cross-examination admissible - Surptitiously made tape-recording of a "captive" audience meeting of employees convened by an employer admissible in unfair labour practice complaint - Viva voce evidence permitted on membership cards missing dates - Threats and questioning of employees concerning the union breach of Act - Statements made at "captive" audience meeting breach of Act - Follow-up meeting not curing breaches - Discharge of employee after the union filed an

unfair labour practice complaint on his behalf breach of Act - Union certified pursuant to s.8

ROYCE DUPONT POULTRY PACKERS; RE U.F.C.W., LOCAL 175, AFL-CIO-CLC; RE GROUP OF EMPLOYEES 492

Change in Working Conditions - Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Union alleging that employer failed to give its usual annual wage increase during the freeze - Reasonable expectations of employees contain an objective element - No breach of freeze - No interference with trade union - Ballots cast in representation vote ordered counted

COCA-COLA LTD.; RE U.F.C.W.; RE GROUP OF EMPLOYEES 427

Construction Industry - Bargaining Unit - Certification - Employer - Whether rebricking of furnace in a smelter plant is maintenance or construction work - Respondent found to be an employer in the construction industry - Certificates issuing

BRIECAN CONST. LIMITED; RE U.A., LOCAL 800 417

Construction Industry - Certification - Pre-Hearing Vote - Respondent failing to meet with officer to make voting arrangements or to file any lists of employees - Intervener arguing that the list should not be finalized in the absence of the respondent and the respondent's records - Board refusing to convene a hearing on the issue - Vote ordered on the basis of the records of the applicant and available information - Ballot box sealed

VICTOR CARPENTRY LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27 524

Contempt - Evidence - Stated Case - Witness - Principal of respondent refusing to produce employment forms without covering over personal information - Union stating case to Divisional Court - Refusal without lawful excuse - Conduct of principal constituting contempt notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on good behaviour

PLAZA FIBREGLAS MANUFACTURING LIMITED, SABINA CITRON, CITRON AUTOMOTIVE DIVISION OF, PLAZA ELECTRO-PLATING LIMITED, CITCOR MANUFACTURING LTD., AND THE ONTARIO LABOUR RELATIONS BOARD; RE U.S.W.A. 528

Discharge for Union Activity - Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Employer breaching Act by asking employees who had joined the union - Statements made at captive audience meeting breach of Act - Employer not meeting onus of demonstrating that it did not lay off employees because of the organizing campaign - Names of employees who were laid off contrary to the Act included on the list of employees - Certificates issuing - Unnecessary to determine s.8

RAINSOON METAL SYSTEMS INCORPORATED; RE S.M.W., LOCAL 30 482

Discharge for Union Activity - Unfair Labour Practice - Bartender discharged during his probationary period - Comfortable situation existing at workplace between management and long-term employees where the collective agreement not strictly adhered to - Equilibrium threatened when bartender hired - Discharge not contravening Act - Alleged theft was the only cause for the discharge

BERESFORD TAVERN, 446285 ONTARIO LIMITED C.O.B.; RE LOCAL 280 OF THE INTERNATIONAL BEVERAGE DISPENSERS' AND BARTENDERS' UNION OF THE H.E.R.E. 405

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Duty of Fair Representation - Unfair Labour Practice - Union officials handling a bump - Employer challenging one of the job placements - Union and employer making special arrangements for employee after union admitted employee was not qualified for the job - Employee farther down in bumping line bringing fair representation complaint - Complaint dismissed	
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PLAZA FIBREGLAS MANUFACTURING LIMITED AND PLAZA ELECTROPLATING LTD. AND CITRON AUTOMOTIVE INDUSTRIES AND SABINA CITRON; RE U.S.W.A.....	479
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ESTONIAN RELIEF COMMITTEE IN CANADA; RE S.E.I.U., LOCAL 204, AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES.....	440
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notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on good behaviour

PLAZA FIBREGLAS MANUFACTURING LIMITED, SABINA CITRON, CITRON AUTOMOTIVE DIVISION OF, PLAZA ELECTRO-PLATING LIMITED, CITCOR MANUFACTURING LTD., AND THE ONTARIO LABOUR RELATIONS BOARD; RE U.S.W.A..... 479

Evidence - Jurisdictional Dispute - Practice and Procedure - Jurisdictional dispute over the electrical instrumentation systems in a paper mill - Board authorizing a Vice-Chair to inquire into the complaint pursuant to s.103(2)(h) following the death of one of the Board members - Respondent bringing motion for non-suit following the completion of the complainant's case - Non-suit succeeding and complaint dismissed - Complainant not having produced evidence that might even arguably lead the Board to grant its claim in whole or in part

BOISE CASCADE CANADA LTD., AND I.B.E.W., LOCAL 1744; RE I.A.M., LODGE 771..... 413

Evidence - Jurisdictional Dispute - Reconsideration - Request by respondent Labourers Union that Board reconsider its ruling to limit evidence of area practice to the demolition of similar structures in an operating environment in the province - Alleged denial of natural justice on the grounds of insufficient notice to parties and predetermination of issues of relevance and weight of evidence - Reconsideration denied - Parties who choose not to prepare themselves to deal with issues raised during a pre-hearing conference do so at their own peril

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128..... 451

Interference in Trade Unions - Certification Where Act Contravened - Change in Working Conditions - Unfair Labour Practice - Union alleging that employer failed to give its usual annual wage increase during the freeze - Reasonable expectations of employees contain an objective element - No breach of freeze - No interference with trade union - Ballots cast in representation vote ordered counted

COCA-COLA LTD.; RE U.F.C.W.; RE GROUP OF EMPLOYEES..... 427

Interference in Trade Unions - Certification Where Act Contravened - Discharge for Union Activity - Unfair Labour Practice - Employer breaching Act by asking employees who had joined the union - Statements made at captive audience meeting breach of Act - Employer not meeting onus of demonstrating that it did not lay off employees because of the organizing campaign - Names of employees who were laid off contrary to the Act included on the list of employees - Certificates issuing - Unnecessary to determine s.8

RAINSOON METAL SYSTEMS INCORPORATED; RE S.M.W., LOCAL 30..... 482

Interference in Trade Unions - Unfair Labour Practice - Bargaining unit position eliminated and persons in those positions promoted out of unit to a pre-existing managerial classification - Whether any anti-union animus in the expansion of the managerial classification or in the number of people promoted - Employer distributing to both unionized and non-unionized employees pamphlets enunciating its personnel policy - Whether contrary to Act - Complaint dismissed with respect to the promotion of bargaining unit personnel but allowed with regards to the pamphlets - Effect of pamphlets was to confuse employees concerning the nature of the union's representation

SIMPSONS LIMITED; RE R.W.D.S.U., AFL:CIO:CLC: AND ITS LOCAL 1000 513

Jurisdictional Dispute - Evidence - Practice and Procedure - Jurisdictional dispute over the elec-

<p>trical instrumentation systems in a paper mill - Board authorizing a Vice-Chair to inquire into the complaint pursuant to s.103(2)(h) following the death of one of the Board members - Respondent bringing motion for non-suit following the completion of the complainant's case - Non-suit succeeding and complaint dismissed - Complainant not having produced evidence that might even arguably lead the Board to grant its claim in whole or in part</p> <p>BOISE CASCADE CANADA LTD., AND I.B.E.W., LOCAL 1744; RE I.A.M., LODGE 771.....</p>	413
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<p>Jurisdictional Dispute - Parties - Settlement - Constituent of Carpenters' Employers' Bargaining Agency not entitled to be a party to the jurisdictional dispute - Whether an oral settlement of the complaint had been reached - Board finding that counter-offer made which nullified the offer of settlement - No longer any offer on the table for acceptance - No settlement - Hearings to continue</p> <p>FERANO CONSTRUCTION LIMITED, L.I.U.N.A., LOCAL 527, AND L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.J.A., LOCAL 2041</p>	446
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Practice and Procedure - Certification - Trade Union Status - Applicant notified that it had not been found to be a trade union under the name in which it had applied - Applicant requesting that its name on the application be amended - Board satisfied that applicant had made a <i>bona fide</i> mistake - Amendment permitted - No hearing necessary - Vote ordered	
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AIRLINE LIMOUSINE SERVICES LIMITED, MCDONNELL-RONALD LIMOUSINE SERVICE LIMITED OPERATING AS; RE TEAMSTERS UNION, LOCAL 938; RE MCINTOSH LIMOUSINE SERVICE LIMITED; RE AIRLIFT LIMOUSINE SERVICES LIMITED; RE AIR CAB LIMOUSINE SERVICES (1985) LIMITED; RE AAROPORT LIMOUSINE SERVICES LTD.	395
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VICTOR CARPENTRY LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27.....	524
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pute resolution procedure to deal with 650 list challenges - Procedure submitted to the Board for its approval - Board approving of appointment of Vice-Chair under s.103(2)(h) to hear evidence and report back to the panel which will then make decisions based on the report - Rulings made by Vice-Chair are deemed to be the parties' settlements - Vice-Chair intended to be a dispute settling mechanism of "last resort"

TORONTO, GOVERNING COUNCIL OF THE UNIVERSITY OF; RE C.U.P.E.; RE GROUP OF EMPLOYEES

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Reconsideration - Evidence - Jurisdictional Dispute - Request by respondent Labourers Union that Board reconsider its ruling to limit evidence of area practice to the demolition of similar structures in an operating environment in the province - Alleged denial of natural justice on the grounds of insufficient notice to parties and predetermination of issues of relevance and weight of evidence - Reconsideration denied - Parties who choose not to prepare themselves to deal with issues raised during a pre-hearing conference do so at their own peril

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128

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Related Employer - Bargaining Unit - Certification - Pre-Hearing Vote - Union seeking to represent a unit of drivers and owner-operators working "under the banner" of the respondent airline limousine companies - Three of named respondents declared one employer - Request to exclude part-time employees and students rejected - Allegations of voting day and membership irregularities dismissed - Board not ruling on the merits of the argument that non-driving brokers should be declared one employer with the named respondents - Certificates issuing

AIRLINE LIMOUSINE SERVICES LIMITED, MCDONNELL-RONALD LIMOUSINE SERVICE LIMITED OPERATING AS; RE TEAMSTERS UNION, LOCAL 938; RE MCINTOSH LIMOUSINE SERVICE LIMITED; RE AIRLIFT LIMOUSINE SERVICES LIMITED; RE AIR CAB LIMOUSINE SERVICES (1985) LIMITED; RE AAROPORT LIMOUSINE SERVICES LTD.

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CONRAD HEATING CO. AND JOE CONRAD; RE S.M.W., LOCAL 47.....

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Sale of a Business - A&P buying Dominion through corporate vehicle New Dominion Stores Inc. - Unprofitable Dominion store in mall closed - NDSI corporately merged into A&P - A&P store opening in newly built part of mall 22 months later - Whether a sale at the time of the amalgamation or when store converted - Assumed that amalgamation constituted a sale - Board finding that A&P store in expanded mall was not a continuation of any part of the Dominion store but only an expansion of A&P's existing business - Application dismissed

NEW DOMINION STORES, THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE R.W.D.S.U., LOCAL 414; RE U.F.C.W., LOCALS 175 AND 633

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Settlement - Jurisdictional Dispute - Parties - Constituent of Carpenters' Employers' Bargaining Agency not entitled to be a party to the jurisdictional dispute - Whether an oral settlement of the complaint had been reached - Board finding that counter-offer made which nullified the offer of settlement - No longer any offer on the table for acceptance - No settlement - Hearings to continue

FERANO CONSTRUCTION LIMITED, L.I.U.N.A., LOCAL 527, AND L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.J.A., LOCAL 2041

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- Unfair Labour Practice - Duty of Fair Representation - Union officials handling a bump - Employer challenging one of the job placements - Union and employer making special arrangements for employee after union admitted employee was not qualified for the job - Employee farther down in bumping line bringing fair representation complaint - Complaint dismissed
- KALLA, NURDIN; RE A.T.U., LOCAL 113; RE TORONTO TRANSIT COMMISSION..... 459
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- LOPEZ, LUIS; RE C.U.P.E. 464
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- Witness - Contempt - Evidence - Stated Case - Principal of respondent refusing to produce employment forms without covering over personal information - Union stating case to Divisional Court - Refusal without lawful excuse - Conduct of principal constituting contempt notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on good behaviour
- PLAZA FIBREGLAS MANUFACTURING LIMITED, SABINA CITRON, CITRON AUTOMOTIVE DIVISION OF, PLAZA ELECTRO-PLATING LIMITED, CITCOR MANUFACTURING LTD., AND THE ONTARIO LABOUR RELATIONS BOARD; RE U.S.W.A..... 528

1358-88-R; 1362-88-R; 1363-88-R; 1364-88-R; 1365-88-R; 1392-88-R Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. McIntosh Limousine Service Limited, Respondent; Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Airlift Limousine Services Limited, Respondent; Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Air Cab Limousine Services (1985) Limited, Respondent; Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Aaroport Limousine Services Ltd., Respondent; Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. Air Cab Limousine Services (1985) Limited, Aaroport Limousine Services Ltd., McIntosh Limousine Service Limited, Respondents; Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. McDonnell-Ronald Limousine Service Limited operating as **Airline Limousine Services Limited**, Respondent

Bargaining Unit - Certification - Pre-Hearing Vote - Related Employer - Union seeking to represent a unit of drivers and owner-operators working “under the banner” of the respondent airline limousine companies - Three of named respondents declared one employer - Request to exclude part-time employees and students rejected - Allegations of voting day and membership irregularities dismissed - Board not ruling on the merits of the argument that non-driving brokers should be declared one employer with the named respondents - Certificates issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Frank J. Luce*, counsel for the trade union and Sam Schouten; *Edward V. Johnson*, counsel for the respondents, as well as *Y. Zahavy* for McIntosh Limousine Services, Air Cab Limousine Services and Aaroport Limousine Services Ltd., *Nick Lemonis* for McDonnell-Ronald Limousine Service Ltd., and *L. Tsatsos* for Airlift Limousine Services.

DECISION OF THE BOARD; May 17, 1989

1. These are several applications for certification in which the applicant has requested and the Board (differently constituted) has directed the taking of a “pre-hearing” representation vote. Because these applications raise somewhat similar issues, and involve the same counsel, it was convenient to address those issues at a single hearing, even though the proceedings were not formally consolidated. Likewise, it will be convenient to address them in a single decision.

2. In order to appreciate the context in which the present proceedings arise, it may be useful to sketch in the background. For ease of exposition, the Board will occasionally refer to some of its earlier decisions between these same parties. To be properly understood, this decision should be read together with those earlier decisions.

3. There is no dispute and the Board finds that in each of these cases, the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

II

4. In each of the applications currently before us the union seeks to represent the drivers of the airline limousines which carry passengers to and from Toronto International Airport. In each case the union proposes a broadly-based bargaining unit, consisting of both drivers and owner-operators working "under the banner" of the respondent companies. This is, in fact, the second series of certification applications respecting those drivers. They all arise out of an organizing campaign which began, and has continued, since 1984.

5. In the fall of 1984, the union filed a number of certification applications relating to the present respondents or their apparent predecessors (see Board Files 1489-84-R, 1490-84-R, 1491-84-R, 1492-84-R and 1549-84-R). The union asserted that it had the support of the majority of the drivers working for each firm, and that it should therefore be certified to represent them for collective bargaining purposes. The respondents, in reply, took a variety of alternative positions:

"That there was no appropriate bargaining unit at all; that the bargaining unit consisted only of a small number of bus drivers; that all of the limousine drivers were independent contractors and therefore not entitled to engage in collective bargaining; that some of the limousine drivers were independent contractors, some were dependent contractors, and some were employees; that the drivers, or some of them, were not employees of the respondents at all, but rather employees of the so-called 'brokers' who contract with the limousine company for the use of one or more operating permits owned by the 'broker'; that if there was to be any bargaining unit at all, it should include all brokers including multi-permit holders, who do not actually drive but may have the right to do so; and that any bargaining unit should also include certain 'livery drivers' who did not fall within the specific regulatory framework of the airport but who, the respondents asserted, were drivers and should therefore be included in any broadly-described drivers unit."

In addition, the respondents took the position that they need not produce a list of the individuals potentially affected by these applications, and that the trade union had no right of access to such information, nor any right to a copy of any list that might be required by the Board.

6. This latter "hide and seek" approach to litigation was rejected in an early decision of the Board for reasons which need not be repeated here. The alternative positions of the respondent, to the extent that they were pursued, were dealt with in a decision of the Board dated March 9, 1988. We shall refer below to certain aspects of both decisions.

7. The initial proceedings were protracted. Although the parties were then agreed that a limited number of witnesses would be representative of all of the various categories of individual potentially affected by the applications, there were still many hearing days before a Labour Relations Officer and hundreds of pages of testimony, together with separate hearings before the Board itself. Ultimately the Board determined that the individuals whom the trade union sought to represent were "dependent contractors" and therefore "employees" entitled to union representation (see section 1(1)(h) of the Act and the Board's reasons in the March 9, 1988 decision). The Board further found that the units of employees appropriate for collective bargaining should be described, in general terms, as follows:

all dependent contractors of the respondent(s) [company name(s)], in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor.

There was no suggestion by the respondents at that time that there should be an exclusion of part-time driver/owner operators or students employed during the school vacation period. That request surfaced, more than four years later, only in the current round of certification proceedings.

8. In its March 1988 decision, the Board had this to say about the so-called “brokers” who do not drive - that is those individuals who have a contract or franchise arrangement permitting them to supply limousine services but choose not to do so in favour of sub-contracting their contractual rights to “working drivers”:

58. It should be noted again that the brokers or contract holders do not have to drive at all and many do not. Nor is it necessary for a broker to own a vehicle. The service contract may be treated merely as an earning asset or investment. Instead of performing the work themselves, brokers may lease their contract(s) to lessee-drivers, charging monthly payments for the privilege of using their contract(s). This fee then becomes the net income for the broker. The evidence of one non-driving broker indicates that he spends 10 to 25 per cent of his work time on his “limousine business” and considers himself to be a self-employed “franchise operator”. According to David Eluik, [a “broker” agreed by the parties to be representative] he has little direct contact with the working drivers using his service contract, and may not even know when substitute drivers are engaged - although the company must be informed about that. He does not monitor the drivers’ daily activities, keeps no trip records, and does not engage in any advertising to attract customers. In his opinion, all of the working drivers associated with his contracts are self-employed independent contractors or “subcontractors” of his franchise. He analogized the situation to that of a house, in which the landlord retained title to the property, and his tenants paid rent and utilities.

The Board drew a distinction between the “brokers” and the “working drivers”:

87. The brokers who do not drive, whether they own one contract or several, are, we think, in a different category. In a sense, they too are part of the company’s organization. They have contractual obligations and reap economic rewards because of their status as a broker. However, their situation is quite different from that of the working drivers because they do not drive, and thus do not supply their own labour in direct service of the company’s customers. They are not subject to the same elaborate network of control which makes the working drivers look more like employees of the company than independent contractors. The non-driving brokers need not and do not appear at the airport at 5:45 a.m. every morning. They do not pick up customers directed to them by dispatch or the platform lineup. They need not wear the regulation uniform or follow the elaborate rules in the drivers’ manual. And so on. As one non-driving broker put it, he is “managing a franchise” and, in our opinion, that characterization is not inaccurate. The non-driving brokers are managing and profiting from their investment in a way which is analytically and generically different from the working drivers who, in addition to their ownership or lease of a service contract, are expending their labour in the direct personal service of the company’s customers, subject to the detailed controls to which we have already referred at length. In our view, for collective bargaining purposes, the non-working brokers are not dependent contractors within the meaning of section 1(1)(h) of the *Labour Relations Act*.

88. We should add that we do not think their presence in the economic matrix alters the fact that their subcontractors, the working drivers, are dependent contractors vis-a-vis one or other of the respondent firms. The non-driving brokers, on the evidence, simply do not exercise “employer-like” authority over the working drivers any more than does the automobile dealership which leases one of the “lessee-drivers”, the vehicle which he needs to fulfill his service obligations. Those controls are exercised by the company. To the extent that a non-driving broker *did* seek to exercise such employer-like functions, a section 1(4) declaration might be appropriate, but that is an eventuality which need not be pursued here.

9. It will be observed that the respondents’ initial position in the first round of proceedings was that these non-driving brokers should be treated as “employees” and included in the bargaining unit along with other employees and dependent contractors. Their present position is that they, together with the non-driving brokers, should be treated as one employer pursuant to section 1(4)

of the Act, and that this employer assertion must be resolved before the new certification applications can be dealt with. We will return to this issue later.

III

10. As we have already mentioned, the litigation of these earlier applications took some years to resolve. Following the release of the Board's decision in March 1988 affirming the drivers' right to organize, the union decided to withdraw the original applications and file new ones requesting the taking of pre-hearing representation votes. Those votes, by secret ballot, would canvass the wishes of the *current* complement of driver/owner operators with respect to trade union representation.

11. The respondents resisted those applications urging the Board not to accept the union's proposed voting constituency (framed in the same terms as the bargaining unit determined by the earlier panel to be appropriate) and urging the Board not to hold any representation vote at all. The respondents demanded the exclusion of "part-timers" and "students" - although the lists filed by the respondents did not identify anyone as a "student" or "part-timer" and simply invited the Board to investigate that matter. The respondents also argued that the Board should not direct a vote because of certain applications subsequently made by the respondents themselves, asserting that the non-driving brokers (i.e. those referred to in the earlier Board decision) were really related employers under section 1(4) of the Act who exercised "employer-like functions". The respondents argued that until these "related employer" issues were resolved, no vote should be taken. This was the same generic group from which the respondent(s) had earlier selected members agreed to be representative, who were found by the Board not to exercise "employer-like" functions at all.

12. We also observe that, in a number of these section 1(4) applications, the respondents were unable to supply the Board with the addresses of the so-called related employers whom, it was said, exercised "employer-like" responsibilities, and with whom, it was said, the respondents were engaged in related activities or businesses under common control or direction.

13. Be that as it may, for reasons set out at some length in a decision dated November 17, 1988, the Board, differently constituted, directed that a vote be taken in the following constituency:

9. We determine that the voting constituency for the purpose of any pre-hearing vote in this application shall consist of:

All dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor.

CLARITY NOTE: The term "dependent contractors" means drivers, lessee-drivers and broker-drivers.

In order to take the respondents' position into account, the Board directed that the ballot of any part-timer or student would be segregated and not counted pending the Board's determination of the bargaining unit issue on its merits. The Board further specified that:

"Insofar as the conduct of the vote is concerned, the voters list will contain the usual notation that persons not named in them who consider themselves eligible to vote should present themselves to the Returning Officer at the time of the vote. As would be the case in the absence of any Board direction to the contrary, anyone asserting the right to vote will be allowed to mark a

ballot, and the ballot of anyone whose eligibility to vote is challenged will be segregated and not counted pending resolution of the dispute over their eligibility.”

14. The respondents’ renewed resistance to supplying a list of the persons potentially affected by this application was resolved by the new panel of the Board in the same way as the earlier panel did. The Board concluded that the trade union was entitled to such list *as a matter of law*. (See paragraph 17 of the Board’s decision and the cases referred to therein.) The related employer issue was deferred to the panel hearing the merits of the case. The ballot boxes were to be sealed pending that hearing. (See paragraphs 3-5 of the Board’s decision of November 17, 1988 explaining the purpose and procedure for pre-hearing votes, and see also the remainder of the decision in which the Board reviewed the issues ultimately raised before us.)

15. With one exception to which we will return below, new votes were conducted in accordance with the Board’s direction. At the conclusion of the balloting, representatives for each of the respondents executed a document certifying the conduct of the election as follows:

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

16. No employee/driver has raised any concern about the way in which the vote was conducted. No employee/driver has suggested that there was any misrepresentation or misunderstanding about what they were voting for (or against). No employee/driver has suggested any improper or irregular conduct on the part of the applicant union, its officials, or supporters. No employee/driver argues that the Board should disregard the ballots cast and direct a new representation vote. Those positions are, however, all advanced by the respondents.

17. During the course of the balloting, the union challenged the voter eligibility of certain individuals. These were persons whom, we were told, the union and its supporters could not immediately identify and whose voter eligibility, therefore, could not be immediately determined. Their ballots were segregated in accordance with the Board’s directions respecting the conduct of the vote. Subsequently, however, the union advised the Board that it was withdrawing all of those challenges and was content to abide by the result based upon the expressed wishes of all those who presented themselves at the polling station and indicated a desire to cast a ballot.

18. The employers did not accept that concession. The employers argued that the union should not be permitted to withdraw these challenges and that the individuals’ voter eligibility should be resolved before the ballots were counted.

19. At the hearing on February 22, 1989, the Board rejected that argument. Neither on the day of the vote, or later, have the employers, themselves, ever challenged the voter eligibility of the persons casting ballots. Once the trade union had withdrawn its challenge to particular voters (whether they were on the employers’ proposed voters’ list or simply appeared at the polling station) there was no issue in dispute requiring further litigation.

20. With this background, then, we turn to the other submissions made to the Board at the hearing on February 22, 1989. We should note that *neither* party sought to call evidence in support of their respective positions. Both counsel were content to make argument based upon the record and facts either agreed upon or assumed to be true. As will be mentioned, below, the Board was not prepared to give any weight to the employers’ speculations about what might have been in the minds of employees, based upon what might have occurred, based upon what the employer was told about what happened. Such speculation based upon double or triple hearsay is inherently

unreliable, and the Board was not prepared to hear testimony which amounted to no more than mere conjecture.

21. At the hearing on February 22, 1989, counsel agreed on the order in which the issues should be addressed. It will be convenient, in these reasons, to follow their agreed format.

SHOULD SOME OF THE NAMED RESPONDENTS BE DECLARED TO BE "ONE EMPLOYER" FOR LABOUR RELATIONS PURPOSES

22. The applicant union asserts that Aaroport Limousine Services Ltd., Air Cab Limousine Services (1985) Limited, and McIntosh Limousine Service Ltd. should be declared by the Board to be one employer for the purposes of the *Labour Relations Act*. The union relies on section 1(4) of the Act which reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The union points to paragraphs 91 to 98 of the March 1988 Board decision and observes that the respondents in this earlier, related proceeding were then agreed that "McIntosh" and "Aaroport", at least were properly treated as one employer. The union contends that there have been no material changes since that time, nor is the third company, "Air Cab", in any different position. The union urges the Board to exercise its discretion under section 1(4) to declare all three firms to be one employer for labour relations purposes.

23. It is agreed that Mr. Zahavy is the President of all three companies: Aaroport, Air Cab and McIntosh. All three companies have the same manager, who, incidentally, was designated as the scrutineer in the representation vote. All three companies have a common dispatch system so that there is necessarily, an integrated work force with an interchange of drivers as required to meet the companies' responsibilities. All three companies share the same location. The companies do have different telephone numbers and separate bank accounts, contract for services and to provide services in their own names, have different receipts and business cards and different corporate names/logos. On the other hand, despite these indicia of a separate corporate existence or position in the marketplace, it is conceded that the nature of the work performed by the employees is basically the same as are the conditions under which they work.

24. Although these three respondents may hold themselves out, to the public, to be separate entities, they are in fact engaged in associated or related businesses or activities under common control or direction and, for the purposes of the Act, it is our opinion that they should be treated as "one employer". We so declare.

THE EXCLUSION OF PART-TIME EMPLOYEES AND "STUDENTS" EMPLOYED DURING THE SCHOOL VACATION PERIOD

25. The respondents repeat the submission made to the panel of the Board directing the representation vote that the voting constituency and bargaining unit should exclude some undetermined and unidentified number of drivers who might be classified as "part-time workers" or "students". There is no indication from the respondents as to how many such drivers may exist, or how their terms and conditions of employment differ from those of the broad category of dependent

contractors found by the Board in the earlier proceeding to be a unit of employees appropriate for collective bargaining; moreover, in that earlier decision, the Board *determined* an appropriate bargaining unit which was both consistent with the evidence then before it and the general structure of collective bargaining units established for taxi drivers in Ontario. The union reiterates that its proposed bargaining unit description in these cases is not only consistent with this earlier Board finding, but is also consistent with the pattern of bargaining units established in this industry. The union also notes that the exclusions now said by the respondents to require further investigation and litigation were not raised in the first round of applications and that the respondents were unable in these proceedings to even identify those individuals said to be so different in their community of collective bargaining interests that they should be grouped together in a separate bargaining unit.

26. In the earlier decision, the Board determined that all of the individuals affected by this application were *dependent contractors*. Section 6(5) of the Act deems a unit of dependent contractors to be appropriate for collective bargaining. The earlier Board decision found such unit to be appropriate in generic terms set out above. And apart altogether from the statutory requirements, the Board's role in constructing bargaining units has been discussed in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, this way:

We might make an additional but related observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

Having regard to these considerations, we are satisfied and find that the units of employees that the union seeks to represent in these applications are appropriately described in the manner adopted by the earlier panel of the Board and without an exclusion of part-time employees or students.

IS THERE AN INCUMBENT UNION WITH AN INTEREST IN THESE PROCEEDINGS?

27. In its pleadings the respondents mentioned the possible existence of a drivers' association which might, on its own behalf, or on behalf of its members, have an interest in these applications. There is no evidence before us that this association actually exists. The respondents do not assert that it is a "trade union" entitled to intervene in these proceedings. The respondents do not assert that any arrangement they may have had, some years ago, with this "association" would, today, constitute a collective agreement within the meaning of the Act. There is no evidence before us that the drivers potentially affected by these applications are "members" of this association. The association itself, if it still exists, has taken no interest in these proceedings. Accordingly, the Board was not prepared to adjourn, and therefore delay, these matters in order to undertake an investigation or inquiry about the identity, potential interest, or possible existence of this non-union entity.

LIST QUESTIONS AND VOTER ELIGIBILITY - "AIRLINE"

28. During the course of its representations, the union withdrew its challenges to the employee lists provided by the respondent companies and the voter eligibility of those individuals who cast ballots. In the case of "Airline" the largest of the respondents, the parties were agreed that the trade union had the requisite 35% to warrant counting the vote. The trade union's challenges were dropped. In the case of Airline the employer's section 1(4) applications were aban-

done. The employer makes no allegations respecting the manner in which the Airline vote was conducted.

29. Once the union dropped its challenges in respect of the other companies, it was apparent that the arithmetic requirements had been met for a counting of the ballots cast without further litigation or complications. The results of that vote are recorded below.

ALLEGATIONS OF VOTING DAY OR MEMBERSHIP EVIDENCE IRREGULARITIES

30. The respondent employers assert that the drivers may not have known what they were signing when they signed union membership cards. The respondents complain that there were union supporters in the vicinity of the polling booths and that there were remarks as between employees in some foreign language (e.g. Punjabi) which the respondents' representatives could not understand. Some number of employees used a pen to mark their ballots while others used a pencil - thereby, the employers contend, raising the possibility that the identity and wishes of the employees might be disclosed. The employers also assert that some employees may not have fully understood what union membership involved or may have misunderstood the effect of their signature on a union membership card or the purpose of a representation vote.

31. The respondents neither called, nor sought to call, direct evidence from any affected employee about these alleged misunderstandings. Nor did any affected employee make such argument. There is no evidence to suggest that what was said respecting the vote, in whatever language, was in any way coercive; and the union pamphlet to which the respondents refer merely extols the virtues of collective bargaining and union representation in somewhat the same manner as a political party might promote itself. There is, in our view, no credible indication of intimidation, coercion, misapprehension, or misunderstanding, and, quite frankly, given the rather complicated contractual and commercial relationships between the respondents and their drivers, it is a little surprising that the respondents assert that the drivers do not know what they are doing in the relatively simple matter posed by the representation vote: do you want to be represented by the trade union or not. Those very same drivers sign contracts in English, follow company rules in English, and are required to use English in their daily work routine. Again, we reiterate, that no employee makes any suggestion of misunderstanding or misrepresentation. The respondents' submissions are entirely speculative.

32. In the case of McIntosh Limousine Service Limited the respondent asserts that the above-mentioned clarity note was missing from the notices to employees and that, therefore, some individuals may have been confused about their eligibility to vote. We note however that:

- (1) anyone who appeared at the polling booth indicating a desire to vote was entitled to cast a ballot;
- (2) it does not seem likely that drivers working for the Aarport, Air Cab, McIntosh group, interchangeably (on the evidence) would be under any illusions about what they were voting for or against;
- (3) no employee has indicated any confusion or misunderstanding about the process;
- (4) the vote took place against a background of years of organizing and efforts by the union to represent the drivers and owner operators working for McIntosh.

Given the prearranged voters list which is not challenged and the availability of a ballot to *anyone* claiming an interest, we do not think that, in all the circumstances, the omission of the clarity note is sufficient grounds to void the vote or disregard its results.

THE EMPLOYERS' RELATED EMPLOYER ASSERTIONS

33. As we have already mentioned, in response to these applications the respondents filed with the Board a number of applications under section 1(4) of the Act, asserting that certain non-driving "contract owners" ("brokers") exercised "employer-like functions" and that, therefore, these applications could not proceed and no vote should be taken until these "related employer" questions had been resolved. As we have also noted, however, the respondent companies often did not even have an address for the entities that they claimed to be "common employers" of the drivers affected by these applications; moreover, the brokers were apparently quite bewildered by the respondents' assertion that they were "employers" or "common employers" of the drivers who directly, or indirectly, made use of their contracts. In their replies, the brokers denied that they were "employing" anyone. One said he was a music teacher who was not directly involved in the business. Another said that he was resident in Europe and exercised no direct control over the operation of the car. The individual broker appearing at the hearing was quite puzzled. He told the Board that he did not understand why he was there. The union agrees with his submission that he should not be.

34. The union contended that this alleged section 1(4) issue was just another "red herring" raised by the respondents to delay these proceedings and prevent a Board-supervised assessment of employee wishes. Counsel noted the passages in the earlier Board decisions (mentioned above) wherein "brokers" agreed by the respondents to be representative of their class were found *not* to have the "employer-like" attributes which the respondents now claim they have. He contrasted the employers' earlier assertion that the brokers were "employees" in the bargaining unit, and their current claim that the brokers are "co-employers" of the working drivers. He noted the incongruity of the respondents' argument that they were engaged in related business activities under common control and direction with persons whose whereabouts they did not even know. He suggested that the section 1(4) applications are just another "ploy" to derail these proceedings, and that they lack even the minimum detail to permit a *prima facie* assessment of the employers' position.

35. We have some considerable doubt about the merits of the employers' section 1(4) claim, and whether, in any event the Board would exercise its discretion to make a section 1(4) declaration. The union's assertions certainly have some surface plausibility. However, the Board did not and does not now rule on the merits of these section 1(4) applications brought by the respondent employers. We decided only that they would not be consolidated with the current certification proceedings and that their resolution would not delay those proceedings. If the union is entitled to certification (as in some instances it is), then certificates should issue and the parties should get on with collective bargaining as they are obliged to do under section 15 of the Act. If there is some "tidying up" to be done on the "employer side" of the bargaining table pursuant to section 1(4), that can be done later without prejudice to the employee rights directly in issue in these various certification applications, and without diminishing the respondents' bargaining obligations.

RESULTS OF THE VOTE AND DISPOSITION OF THE CASE - "AIRLINE": BOARD FILE NO. 1392-88-R

36. The Board finds that the unit of employees appropriate for collective bargaining is framed as follows:

All dependent contractors of the respondent McDonnell-Ronald Limousine Service Limited operating as Airline Limousine Services Limited, in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor.

37. In the bargaining unit description set out above, for the purpose of clarity, the Board notes the parties' agreement that the term "dependent contractors" means drivers, lessee-drivers, and broker drivers.

38. On the taking of the pre-hearing representation vote directed by the Board less than fifty per cent of the ballots cast were cast in favour of the applicant.

39. The application is therefore dismissed.

40. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

41. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

RESULTS OF THE VOTE AND DISPOSITION OF THE CASE - AAROPOORT, AIR CAB AND MCINTOSH: BOARD FILE NOS. 1364-88-R, 1363-88-R, AND 1358-88-R

42. The Board finds that the unit of employees appropriate for collective bargaining is framed as follows:

All dependent contractors of the respondent Aaroport Limousine Services Ltd., Air Cab Limousine Services (1985) Limited, and McIntosh Limousine Service Limited in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor.

43. In the bargaining unit description set out above, for the purpose of clarity, the Board notes the parties' agreement that the term "dependent contractors" means drivers, lessee-drivers, and broker drivers.

44. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

45. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

46. A certificate will issue to the applicant.

47. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement

requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

**RESULTS OF THE VOTE AND DISPOSITION OF THE CASE - AIRLIFT: BOARD FILE
1362-88-R**

48. The Board finds that the unit of employees appropriate for collective bargaining is framed as follows:

All dependent contractors of the respondent Airlift Limousine Services Limited in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor.

49. In the bargaining unit description set out above, for the purpose of clarity, the Board notes the parties' agreement that the term "dependent contractors" means drivers, lessee-drivers, and broker drivers.

50. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

51. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

52. A certificate will issue to the applicant.

53. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

2934-88-U Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' Int'l Union, Complainant v. 446285 Ontario Limited c.o.b. **Beresford Tavern**, Respondent

Discharge for Union Activity - Unfair Labour Practice - Bartender discharged during his probationary period - Comfortable situation existing at workplace between management and long-term employees where the collective agreement not strictly adhered to - Equilibrium threatened when bartender hired - Discharge not contravening Act - Alleged theft was the only cause for the discharge

BEFORE: *Paula Knopf*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *R. W. Kuszelewski*, *James Jackson* and *Gerry Whitman* for the complainant; *Daniel A. Sinclair*, *Bill Gogos* and *Rod Cipparone* for the respondent.

DECISION OF PAULA KNOFF, VICE-CHAIR AND BOARD MEMBER J. A. RONSON; May 15, 1989

1. This is a complaint alleging breaches of sections 64, 66 and 70 of the *Labour Relations Act*. The complaint alleges that Gerald Whitman was discharged from his employment as a bartender/waiter as a result of his union involvement and attempts to assert his rights under the collective agreement and the Act. The respondent answers the complaint by alleging that Mr. Whitman was discharged during his probationary period because of reports received about theft and complaints from customers and other employees about Mr. Whitman's conduct.

2. Given the nature of the complaint and statutory onus upon the respondent, we heard the evidence of the respondent first. The respondent had three witnesses to testify. These were the owner of the premises and two long-term employees. Bill Gogos had been a waiter for eleven years at the Beresford Tavern. He testified that he advised the tavern owner, Rod Cipparone, about statements made by Mr. Whitman to the effect that he intended to bring about changes to the establishment once the thirty-day probation period had been passed.

3. Daniel Sinclair also testified on behalf of the respondent. He has worked seven and half years at the tavern. He is the union's shop steward and gave more detailed evidence. He testified about a number of discussions and events involving Mr. Whitman in the last week of his employment that Mr. Sinclair related to Mr. Cipparone. Only the relevant incidents need to be recorded here. Specifically, Mr. Sinclair described that on or about the Wednesday of Mr. Whitman's last week of employment, Mr. Whitman discussed bringing his own bottle of vodka and orange juice to drink at the bar rather than paying for his drinks. Further, Mr. Sinclair told of Mr. Whitman mentioning that when his thirty-day probation period was up, "everything would change at the Beresford." Mr. Sinclair admitted that Mr. Whitman never specified what was meant by that. Mr. Sinclair also told of an incident when Mr. Whitman was working as bartender. Mr. Sinclair said that he gave Mr. Whitman payment for an order which included two \$1.00 soft drinks. Mr. Sinclair said that he never saw the cash for the soft drinks being run into the cash register whereas the other items were entered. Further, when he questioned Mr. Whitman about it, Mr. Whitman was said to have told Mr. Sinclair to "be quiet" so that another employee would not overhear the transaction. Very shortly thereafter, Mr. Whitman offered Mr. Sinclair a drink from the bar. When Mr. Sinclair asked if Mr. Whitman was paying for the drink, Mr. Whitman said to his reply "don't worry, Rod [the tavern owner] will pay." Finally, Mr. Sinclair related that he had overheard a couple of complaints from customers regarding Mr. Whitman's attitude towards them when he was acting as a waiter.

4. Mr. Sinclair testified that he related all these incidents to Mr. Cipparone on or about Thursday, February 17th. Mr. Cipparone confirmed this in his own testimony. He also related how he had had discussions with Mr. Whitman prior to hiring him and through these became aware of the fact that Mr. Whitman had been actively involved with the Bartenders' Union and had run for executive office at one point. Mr. Cipparone then hired Mr. Whitman as a bartender/waiter because of a shortage of staff and the need for experienced assistance. Mr. Cipparone said that he heard complaints about Mr. Whitman through his staff very early on about Mr. Whitman's intention to bring about changes as soon as the probationary period had concluded. Mr. Cipparone said that he did not react right away to any of this and there is no evidence to suggest that he was particularly troubled by this at the time. However, when Mr. Cipparone heard the information from Mr. Sinclair which is related above he reflected upon it for a day or two and then claimed that he decided to fire Mr. Whitman on February 18th "for stealing my stock." Mr. Cipparone said he relied completely upon the word of Mr. Sinclair in making the decision. Mr. Cipparone did not undertake any independent investigation of the alleged theft or the misappropriation of property

although he had done so on previous occasions. Mr. Cipparone also admitted that he had been told by other employees of Mr. Whitman's comment that he intended to change things after the probationary period was passed. Mr. Cipparone related his differing views with Mr. Whitman on the owner's responsibilities under the collective agreement and that he did not consider Mr. Whitman's views to be valid or enforceable. So Mr. Cipparone swore that no anti-union animus or Mr. Whitman's attempts or threats to enforce collecting bargaining rights entered into the decision to terminate.

5. In response, Mr. Whitman testified and explained his long standing and active participation with the union. He admitted discussing this with Mr. Cipparone before being hired. Mr. Whitman related further conversations with Mr. Cipparone shortly after being hired over the various rights in the collective agreement which Mr. Whitman did not feel were being respected at the tavern and which no one else seemed to want to assert. Mr. Whitman strongly denied any financial impropriety. Also, Mr. Whitman testified about the several ways in which he believed the tavern was operating contrary to the collective agreement and to other applicable statutes. The clear implication of this evidence was that Mr. Whitman's presence and active statements about some of these matters threatened the mode of operation of the tavern.

6. Finally, Mr. Whitman testified that he was told of his discharge on Friday, February 17th between about 9:00 and 9:30 p.m. His uncontradicted evidence was that Mr. Cipparone told him that he "wasn't needed any more ... You don't fit in here. You'd be better off in a large establishment where the staff and the union are more clearly on different sides. We settle our own problems here." However, after having been told this, Mr. Whitman was asked by Mr. Cipparone if he wanted to work the next day as a waiter. Mr. Whitman agreed to this and his last day of work was Saturday, February 18th.

7. On the basis of this evidence, the union argued that Mr. Whitman was fired because of his assertion of collective bargaining rights and because his employment appeared to threaten the "cosy" relationship between the employment and management of the tavern that often offended the collective agreement. It was asserted that these factors were more important to the decision to fire than the alleged and unsubstantiated allegations of theft.

8. On the other hand, Mr. Cipparone argued that the motive for the firing of Mr. Whitman was the alleged theft and that the decision was made entirely regardless of any union activity on the part of Mr. Whitman.

The decision

9. There are several significant factors in the evidence. It is clear that a very comfortable situation exists at the Beresford tavern between management and the long-term employees. The result of this situation is that the collective agreement may not be strictly adhered to, but no employees within memory have launched individual grievances because of this. In other words, an equilibrium exists to the mutual satisfaction of the employees and management that neither seems to be anxious to change willingly.

10. When Mr. Whitman was hired, that equilibrium was somewhat threatened. He made his views well known about his intention to bring about a number of changes. This came to Mr. Cipparone's attention almost immediately. Indeed, at the time of the firing, Mr. Cipparone told Mr. Whitman that he would probably be happier in a place where the roles of management and employees were more clearly defined. All these factors certainly raise a strong suspicion of anti-union animus as being a factor in the decision to terminate.

11. However, on the balance of the evidence, we are persuaded that the decision to terminate did not contain any elements that would contravene the Act. It must be recalled that Mr. Whitman's commitment towards this union and his activities on its behalf were well known to Mr. Cipparone before Mr. Whitman was hired. Further, Mr. Whitman started voicing his dissatisfaction about how the tavern was being run very early and this too was known to Mr. Cipparone. All of this was tolerated and did not seem to be of any concern to Mr. Cipparone. This may be largely because Mr. Cipparone had widely different views from Mr. Whitman as to the requirements under the collective agreement and felt that Mr. Whitman's position had little or no support in the contract. Be that as it may, the situation continued for several weeks without any changes. However, the critical event that occurred was when Mr. Sinclair raised the allegation of theft against Mr. Whitman. For purposes of this decision we need not make any finding as to whether the theft occurred or not. But we are completely satisfied that Mr. Cipparone totally relied upon the word of Mr. Sinclair when the allegations were raised. This is understandable given Mr. Sinclair's long employment at the tavern and the fact that he is a union steward. While it was clear that his position of union steward was not a very active one, the fact that he is a union steward and not someone in a close relationship to management is very significant. Having heard these allegations from an entrusted employee during the currency of the probationary period, Mr. Cipparone decided to fire Mr. Whitman. If anti-union animus was involved the firing could and would have occurred much earlier. Therefore, we are willing to conclude that the allegations of theft was the cause for the discharge and that no anti-union animus was a contributory or motivating factor.

12. We recognize that the fact that Mr. Whitman was allowed to work one day after the discharge on the grounds of alleged theft is unusual. But we note that the alleged theft occurred while Mr. Whitman tended the bar. The last day of work was as a waiter where opportunities for misappropriation of funds are much less. We also recognize that the words spoken at the time of the discharge suggest the union activities were contributory factors. But in the context of the history of dealings between the two men, we are fully satisfied that the words reflect Mr. Cipparone's attempt to explain to Mr. Whitman that he simply did not fit in with the collegial atmosphere in this small tavern. This does not necessarily imply anti-union animus and in the context of this case it reflects the conflict of style and personalities that developed early between Mr. Whitman and the senior staff. While this was tolerated for a while, the allegation of theft brought the tolerance to an end and the employer took the predictable step of terminating before the employee could acquire the rights available to him as a permanent employee under the collective agreement.

13. Therefore, while the case does present some troublesome factors, we are fully satisfied that Mr. Whitman was hired and employed on the understanding that he was an ardent union activist. Further, Mr. Cipparone has satisfied the onus of establishing that he was not prepared to continue to employ a probationary employee in the face of two allegations of financial impropriety made by a trusted, long-term employee who was also the union shop steward and who had nothing to gain by raising the allegations.

14. Thus, we conclude that the respondent has fulfilled its onus of establishing that no violation of the *Labour Relations Act* occurred. The complaint is therefore dismissed.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; May 15, 1989

1. The complainant alleges that Gerald Whitman was discharged from his employment as a bartender/waiter as a result of his attempts to assert his rights under the collective agreement and the Act.

2. The respondent answers the complaint by alleging that Mr. Whitman was discharged during his probationary period prim

arily because of an allegation of theft against him, but the majority also refer to evidence suggesting that there were complaints from customers and complaints from other employees with respect to Mr. Whitman.

3. Prior to reviewing the evidence before the Board, it is useful to review the effect of the reverse onus of proof found in section 89(5), and more particularly, the fact that the grievor's union activity need only be one aspect of an employer's decision to terminate in order for that decision to be unlawful. In *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, the Board, at pages 40 and 41, explained the effect of the reverse onus of proof and stated that to discharge the onus the employer was required to establish that:

18. In a complaint of this nature filed under section 79 [now 89] of the Act, the provisions of section 79(4a) [now 89(5)] apply which place the burden of proof on the employer to show, on the balance of probabilities, that it did not discharge the grievor for union activity or through an anti-union animus. In *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665 at page 673, the Board explained the burden of proof on the employer in the following terms:

"Having regard to section 79(4a) [now 89(5)] a respondent employer must satisfy the Board that in taking the actions it took it was in no way motivated by a grievor's union activity. Thus the Board may not find that an employer's sole reason for acting stems from the union activity of his employees to find a violation of legislation but rather an employer must satisfy the Board that the union activity played neither a major or minor role in regard to its impugned actions."

In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 the Board at page 749 further explained the effect of the reverse onus of proof and stated that to discharge the onus the employer was required to establish two fundamental facts:

"...first, that the reasons given for discharge are the only reasons and, second, that the reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

19. Seldom will an employer admit that it has been motivated by anti-union animus in discharging an employee. The Board, therefore, is required to draw its own conclusion as to the employer's motivation and in doing so must draw inferences from the evidence. In discharging an employee, the Board looks for a reasonable explanation for discharge. If the employer provides little [sic] or no explanation for terminating an employee and there is concurrent evidence of union activity the Board may, depending on the circumstances, draw the inference that the employer had an anti-union animus and acted in violation of the Act. If the employer establishes good cause for discharge on the other hand, the Board will normally require more cogent evidence of union activity, the grievor's participation in the campaign and the employer's knowledge of it before being willing to draw an inference of anti-union motivation. The evaluation of the adequacy of the employer's reasons for discharge is not aimed at determining whether the employer had just cause for discharge but is rather a step in the more complex process of ascertaining the employer's motivation. While unfair discharge does not itself establish a violation of the Act, it may be evidence from which the Board will, in certain circumstances, draw an inference of anti-union animus.

In the instant case one of the reasons for discharge, in my opinion, was the presence of an anti-union motive.

4. Turning now to the evidence, a review of the employer's reasons and the evidence provided therefore, disclose the following. As the majority point out, it is clear that "a very comfort-

able situation exists at the Beresford Tavern between management and the long-term employees". Furthermore, it does appear that the collective agreement may not have been strictly adhered to notwithstanding the presence of the union in the workplace. It is also clear that after Mr. Whitman was hired, that equilibrium was threatened.

5. With respect to the allegation of theft, Mr. Cipparone testified that he relied on Mr. Sinclair's information completely. No other investigation was conducted, for example, to determine whether or not the tallies for the cash indicated whether the soft drinks had been rung in, nor was Mr. Whitman asked his version of the events. Mr. Cipparone testified that he felt this was unnecessary because Mr. Whitman was only a probationary employee. However, Mr. Whitman vehemently denied any allegation of theft at the hearing and further testified that during his 25 years in the bartending industry, this was the first such allegation. Mr. Cipparone also acknowledged that he had undertaken investigations involving alleged thefts on previous occasions. I do not agree with the inference drawn from the conversation noted at paragraph 5 of the majority decision. Mr. Whitman and Mr. Sinclair were at the same time discussing those parts of the collective agreement which Mr. Whitman felt were not being enforced. Mr. Whitman's comment, "Be quiet here comes Bob", was directed to the conversation about the collective agreement, and had been advised not to discuss anything in front of Bob Bird about the union as he told Mr. Cipparone everything. It would appear that the comment was intended to ensure that the discussion would not go any further.

6. The second matter referred to was complaints from customers. The only evidence that the Board heard with respect to this issue was that of Mr. Sinclair. He had informed Mr. Cipparone that he had overheard a couple of complaints from customers regarding Mr. Whitman's attitude while he was working as a waiter. There was no evidence as to the nature of these complaints, when or where they occurred, or whether or not Mr. Sinclair witnessed Mr. Whitman's impugned conduct. However it was acknowledged by Mr. Sinclair that it is impossible to work as a waiter without generating some complaints from some customers.

7. Finally, with respect to the third matter raised, that is complaints from other employees, Mr. Cipparone testified that he heard complaints about Mr. Whitman from his staff. However, these complaints relate to Mr. Whitman's stated intention to "bring about changes" once his probationary period had passed.

8. This then brings us, in my opinion, to the more telling evidence. Both Mr. Gogos and Mr. Sinclair testified that they understood that Mr. Whitman intended to bring about some changes to the tavern once he was no longer on probation. It is also clear from the evidence that Mr. Cipparone was aware of these statements made by Mr. Whitman. It is clear that all of the persons involved came to understand that Mr. Whitman believed that the collective agreement was not being properly implemented. Yet Mr. Sinclair, the shop steward, testified that he had no collective agreement in his possession, and further, that "he was not aware of a collective agreement being in force until the day of the hearing". Given that, I accept that Mr. Whitman and Mr. Sinclair had conversations concerning the collective labour agreement, this evidence would leave me to believe that Mr. Sinclair was not entirely candid with the Board. This result leads me, after utilizing the usual criteria in assessing the credibility of witnesses, to prefer the evidence of Mr. Whitman to that given by Mr. Sinclair where there is any significant conflict in their evidence.

9. Mr. Cipparone testified that he had discussions with Mr. Whitman prior to hiring him and that through these he became aware of the fact that Mr. Whitman had been involved with the union and had run for its executive office at one time. The fact that Mr. Cipparone was aware of this information before Mr. Whitman was hired does not explain away Mr. Cipparone's actions in

terminating Mr. Whitman. Given Mr. Cipparone's apparent relationship with the union in his establishment, the fact that Mr. Whitman had had some involvement may have caused Mr. Cipparone no concern at the time of hire. It would seem that at that time Mr. Whitman was hired because there was a shortage of staff and Mr. Cipparone felt a need for experienced staff.

10. The most telling evidence is Mr. Whitman's uncontradicted evidence of what he was told by Mr. Cipparone at the time of his termination. Mr. Cipparone indicated to Mr. Whitman that, "...you don't fit in here. You'd be better off in a place with a large staff, union on one side and management on the other. We settle our own problems, we don't run to the union, we don't rely on the union re: wages, and if you get your 30 days in it would be difficult."

11. Initially it seems, Mr. Cipparone was not concerned about Mr. Whitman's voiced dissatisfaction about how the tavern was being run. However, within a day or two of Mr. Sinclair reporting to Mr. Cipparone, the decision to terminate was made. I disagree with the majority that Mr. Sinclair was not someone in a "close relationship to management". In the circumstances at this tavern, it would seem more accurate to describe the relationship as one of the shop steward turning a blind eye. The arrival of Mr. Whitman would certainly affect Mr. Sinclair's ability to conduct himself and the local union affairs in the same manner as before. The allegations upon which Mr. Cipparone relied came solely and directly from Mr. Sinclair. Yet, Mr. Cipparone did nothing to investigate the matter in any manner whatsoever. Finally, if the alleged theft was ultimately the only reason for the discharge, why was it not put to Mr. Whitman at the time of discharge. Furthermore, the fact that Mr. Whitman was allowed to work a shift the day after he was discharged is inconsistent with the reaction of *any* employer concerned about theft.

12. Mr. Whitman clearly expressed his intention to engage in further union activity once he was off probation. During his probation he had conversations with Mr. Cipparone about his union activity and about various rights in the collective agreement which he felt were not being respected at the tavern. He also noted that these were rights which no one seemed to want to assert, for example, the tavern not providing a float to employees as he felt was required under the collective agreement, and that some employees were being paid cash. In my opinion, it is clear that Mr. Cipparone decided to terminate Mr. Whitman's employment in order that Mr. Whitman not have an opportunity to pursue these stated intentions. This goes further than simply a difference in style or personality between Mr. Whitman and the other employees and Mr. Cipparone. I am not satisfied that Mr. Cipparone did not discharge the grievor for his union activity, at least in part. It is not for the Board to determine whether or not a theft occurred but whether someone has been dealt with in a manner contrary to the *Labour Relations Act*.

13. Accordingly, I would direct that the respondent forthwith reinstate Mr. Whitman in the same position which he held on the date that he was discharged and that the respondent pay Mr. Whitman full compensation for any lost wages to which he is entitled to the date of reinstatement.

0174-89-R Amalgamated Clothing and Textile Workers Union, Applicant v. Blue Bell Canada Incorporated, Respondent v. Group of Employees, Intervener

Certification - Practice and Procedure - Trade Union Status - Applicant notified that it had not been found to be a trade union under the name in which it had applied - Applicant requesting that its name on the application be amended - Board satisfied that applicant had made a *bona fide* mistake - Amendment permitted - No hearing necessary - Vote ordered

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

DECISION OF THE BOARD; May 16, 1989

1. This is an application for certification.
2. "Group of Employees" is added to the style of cause as "Intervener".
3. Prior to the scheduled hearing in this matter, the parties met with a Labour Relations Officer and settled all matters in dispute among them. They further waived their right to a formal hearing before a panel of the Board.
4. The applicant filed this application under the name "Amalgamated Clothing and Textile Workers Union AFL-CIO; CLC". By letter dated April 25, 1989, the Registrar informed the applicant that "the Board has not found in any previous proceeding that the applicant has been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* under [that name]". The letter invites the applicant to inform the Board if that information is incorrect. The applicant requested that its name on the application be amended to "Amalgamated Clothing and Textile Workers Union", a name under which an organization had been found to be a trade union. The other parties consent to the amendment and agree that the applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"). We are satisfied that the applicant has made a *bona fide* mistake and therefore, pursuant to section 104 of the Act, we hereby amend the application to reflect the applicant's name as "Amalgamated Clothing and Textile Workers Union" and the style of cause is correspondingly amended.
5. The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.
6. Having regard to the agreement of the parties, the Board finds that

all employees of the respondent in the Town of Renfrew, save and except supervisors persons above the rank of supervisor, office, clerical and sales staff, truck drivers, mechanics, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period,

constitute a unit of employees of the respondent appropriate for collective bargaining.
7. The applicant filed sufficient applications for membership to warrant certification without a vote. There were also filed statements of desire in opposition to the union ("the petition"). The number of persons who signed both the petition and applications for membership was such that the Board would ordinarily inquire into whether the petition was a voluntary expression of those persons who signed it in order to determine whether to direct a vote, despite the level of

membership support evidenced by the number of cards filed. The applicant does not challenge the voluntariness of the petition and has agreed to the taking of a vote, however.

8. The Board is satisfied that not less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 3, 1989, the terminal date fixed for this application and the date which the Board determines, under clause 103(2)(j) of the Act, to be the time for ascertaining membership under subsection 7(1) of the Act.

9. Therefore, the Board directs the taking of a representation vote in this application.

10. All employees in the bargaining unit on May 11, 1989 who are also in the bargaining unit on the date the vote is taken will be eligible to vote.

11. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

12. This matter is referred to the Registrar.

2747-84-JD International Association of Machinists and Aerospace Workers, Lodge 771, Complainant v. **Boise Cascade Canada Ltd.**, and International Brotherhood of Electrical Workers, Local Union 1744, Respondents

Evidence - Jurisdictional Dispute - Practice and Procedure - Jurisdictional dispute over the electrical instrumentation systems in a paper mill - Board authorizing a Vice-Chair to inquire into the complaint pursuant to s.103(2)(h) following the death of one of the Board members - Respondent bringing motion for non-suit following the completion of the complainant's case - Non-suit succeeding and complaint dismissed - Complainant not having produced evidence that might even arguably lead the Board to grant its claim in whole or in part

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. A. Correll and P. V. Grasso.

APPEARANCES: Robert Pollard and Lowell Paulson for the complainant; Peter J. Thorup, William B. Murray, Jim Gartshore and Rusell Westover for the respondent employer, and S. B. D. Wahl, D. Langtry and H. Fulton for the respondent union.

DECISION OF THE BOARD; May 19, 1989

1. This is a complaint filed by the International Association of Machinists and Aerospace Workers, Lodge 771 ("IAM") pursuant to section 91 of the *Labour Relations Act*. The work in dispute affects 16 systems at the Boise Cascade Canada Ltd. (Boise) mill in Fort Frances. These systems are described in detail in Vice-Chair Herman's report dated September 19, 1988 and listed in Boise's brief on page 6. After the complainant completed its case and a procedural ruling was made with respect to the non-suit motion brought by the International Brotherhood Electrical Workers ("IBEW"), the panel of the Board hearing the case was unable to continue due the untimely death of one of the Board Members. A different panel of the Board heard the submissions of the parties on how to proceed. By decision of February 25, 1988 the Board authorized

Vice-Chair Herman pursuant to section 103(2)(h) of the Act to inquire into this complaint. Paragraph 17 of that decision states:

For the above reasons, the Board, pursuant to section 103(2)(h) of the Act, hereby authorizes Vice-Chair Herman to inquire into this jurisdictional dispute, to make findings of fact on the basis of the evidence which has been and will be adduced before him regarding this complaint, and to report to this panel with respect thereto.

2. The procedure adopted by the Board, as outlined in the July 15, 1988 letter, was to first deal with the motion for non-suit. Pursuant to our direction, Vice-Chair Herman issued a comprehensive report containing 198 pages of evidence led by the complainant. The report detailed the evidence of seven witnesses called by the complainant during approximately 24 hearing days.

3. At the outset of the hearing into the non-suit motion the complainant withdrew its request for reconsideration contained in a telegram dated October 25, 1988 with respect to the procedural ruling made by the earlier panel not to put the IBEW to its election to call further evidence.

4. The Board heard the parties' submissions, which are summarized below, on whether the motion for non-suit should succeed based on the evidence contained in Vice-Chair Herman's report. No party asserted that Vice-Chair Herman's report of the evidence was inaccurate or incomplete in any respect.

5. The respondent Interatnional Brotherhood of Electrical Workers, Local Union 1744 ("IBEW") submits that the evidence led by the complainant in no way supports the Machinists' contention in this complaint. The respondent IBEW urges the Board to view the evidence and determine the issue as if it were a complete jurisdictional dispute and come to a conclusion and make a ruling on the basis of the evidence that is before the Board. Rule 71 of the Board's Rules of Procedure allows the Board to dismiss for failure to show a *prima facie* case for the remedy requested prior to any hearing. Counsel for the IBEW submits there is even more compelling reason to dismiss for failure to show a *prima facie* case after a lengthy pre-hearing process and 24 days of hearing. The complainant had every opportunity to call the evidence it wanted to convince the Board of its case. The respondent IBEW submits the Board must look at the evidence adduced by the complainant and determine if the evidence at its highest and without any contradictory evidence, would entitle the Machinists to the remedy requested.

6. The respondent Boise asks the Board to assume that the evidence before the Board is all the evidence and based on that evidence at its highest would the Board grant the complainant's remedy. If the answer is yes both parties would be leading further evidence. At the start of this lengthy and costly proceeding the IAM was asked what it was claiming, given that the proceeding started with two systems in the original complaint. The complaint was then amended to include sixteen systems at Boise's mill in Fort Francis.

7. Boise submits there are two choices: granting the IAM's claim, which will result in numerous jurisdictional disputes; or preserving the status quo, the historical demarcation line of IAM performing pneumatic, fluidic and hydraulic instrumentation and the IBEW performing electronic instrumentation. The respondent Boise contends that IAM has not proved any of the essential elements necessary to establish its claim. There is no evidence with respect to IAM's claim of pneumatic controls being converted to electronic controls. The IAM collective agreement talks about "pneumatic, fluidic, hydraulic", *not process control*. The complainant's evidence does not show that the demarcation line is or has been process versus motor control. The IAM has unsuccessfully tried to obtain all instrumentation work, including electronic, during negotiations. There

is no evidence before the Board that this work (electrical instrumentation) was done by members of the IAM.

8. The IAM wants to carve out 16 systems from the numerous similar or identical systems throughout the mill but for which it is not seeking the work. In the respondent's view this would be totally unworkable. The evidence before the Board is that the historical demarcation line has been followed when making work assignments. Boise submits on the evidence contained in Vice-Chair Herman's report, the Board cannot grant the relief requested by IAM.

9. The complainant rejects the IBEW's motion for non-suit and urges the Board to proceed with this complaint. The IAM's claim is in 2 parts,

- 1) work performed by Instrument Mechanics under clear jurisdictional guidelines spelled out in the collective agreement which was replaced through technological change, permitting the same function to be performed by different means, is work that falls within IAM's jurisdiction.
- 2) process control comes under IAM's jurisdiction.

10. The complainant submits if there are any of the 16 systems where the evidence fails to establish that IAM members used to do the work which has been assigned to the IBEW the Board "may subtract that system from the total".

11. It is the position of the IAM that another dividing line between the IAM and IBEW is the voltage used. If it is less than 110 volts it is the work of the IAM and if it's more than 110 volts it's the work of the IBEW. On work above 110 volts an electrician's ticket is required.

12. The IAM takes the position that the "historical demarcation of pneumatics vs. electronics only goes back to 1982 and is not a very long historical background". Prior to that, the IAM states, there was no clear demarcation but admits the technology was different. The complainant submits on the weight of the evidence there is a case for the IBEW and Boise to answer. The IAM contends while it may not have made a case for each of the 16 systems, not every case is a change in jurisdiction. Some are new systems. Some are ad-ons. It is IAM's position that the Board cannot make the ruling on the evidence to date.

13. Section 91(1) of the Act states:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

14. It is useful to set out the pertinent clauses in the collective agreement between IAM and Boise.

Article 300 - Union Recognition and Security

301.2: Lodge No. 771 of The International Association of Machinists and Aerospace workers is also recognized as the exclusive bargaining agent for all employees engaged in installation,

maintenance, dismantling, repairing and assembling *all pneumatic, hydraulic and fluidic instrumentation* in the Fort Frances mill.

[emphasis added]

Article 1400 Technological change

Article 1401 (a) and (b):

14.01: The Company has the right to adjust all or any of its crews as a result of change in process or a change in equipment, and to make such technical and other changes in its manufacturing processes as it deems necessary for efficient operation.

In recognition of the impact that such changes may have upon employees, and the concern of the parties regarding employees who may be affected, the following will apply:

- (a) The Company undertakes to advise the Union as far in advance as is feasible of such changes which the Company has decided to introduce which will result in significant change in the employment status of employees.
- (b) The Company agrees to discuss with the Union the effect of such changes on the employment status of employees and to consider practical ways and means of minimizing the adverse effect on employees displaced by such change. measures such as early retirement, retraining and transfers to other existing jobs will be considered.

OPERATION CHANGES

Article 1800 -

18.01: The Company undertakes to advise the Union as far in advance as is feasible, of major changes in operating schedules, equipment installation, etc., which will result in significant change in the employment status of employees. The Company agrees to discuss with the Union the effect of such changes on the employment status of employees and to consider practical ways and means of minimizing any adverse effect on employees displaced by such changes. Measures such as retraining, transfers to other existing jobs and early retirement will be considered. The Company agrees to recognize established jurisdictional lines in the implementation of this Article 1800.

15. Article 300 Union Recognition and Security clause contained in the collective agreement between IBEW and Boise states:

- 301 (a) The Union is recognized as the sole bargaining agent for all employees assigned to perform work such as that described in 301 (b).
- (b) It is hereby agreed and understood that Local Union 1744, of the International Brotherhood of Electrical Workers, has jurisdiction over the work of installation, maintenance and *repair and handling as presently practiced of all electrical, electronic and Company-owned communications equipment including the electrical portion of metering, control instruments, computer systems and refrigeration units; including the installation, operation, maintenance generation and distribution of electrical power.* The Company further recognizes the foregoing jurisdiction applies to work within the paper mill premises, power houses and other paper mill and kraft mill operations associated directly with the Company's paper mill operations.

[emphasis added]

16. The question put before the Board is whether the evidence, at the conclusion of the complainant's case, is sufficient such that the respondents should be called upon to respond. The IAM in its brief stated:

"The work in dispute is the servicing and maintenance of the 16 systems that have been assigned to the members of the International Brotherhood of Electrical Workers, Local 1744."

It is the IAM's claim that some of these systems have been converted from pneumatic and hydraulic instrumentation to electronic instrumentation and that these systems prior to the change were operated by the IAM.

17. When reviewing the collective agreements between the IAM and Boise and between IBEW and Boise, and all of the other evidence led by the complainant, there is nothing in the evidence before us which would lead the Board to conclude that Boise is in violation of either agreement in the manner in which work was assigned to members of the IBEW or the IAM. The IAM agreement speaks of "all pneumatic, hydraulic and fluidic instrumentation in the Fort Francis Mill". The IBEW agreement states, ... "the electrical portion of metering, control instruments," Neither agreement refers to "process control" being the line of demarcation.

18. The IAM agreement in Article 1800 addresses operation changes and include the words: "The Company agrees to recognize established jurisdictional lines in the implementation of this Article 1800". The IAM agreement also contains language on technological change in Article 1400 and recognizes the impact on employment.

19. Accepting the evidence contained in Vice-Chair Herman's report the Board is satisfied that the relevant criteria for determining jurisdictional disputes, such as collective bargaining relationship and agreements, skill and training, considerations of economy and efficiency, impact on job security, employer practice and employer preference, would not favour the complainant and the Board would not grant the relief requested by the IAM.

20. Having considered at length the extensive report of the complainant's evidence, the submissions of the parties and the cases cited, the Board finds the IAM has not produced evidence that might even arguably lead us to grant its claim in whole or part. The evidence indeed suggests the contrary, that the assignment to the IBEW was the most appropriate in all the circumstances. Therefore the motion for non-suit succeeds and this complaint is dismissed.

2002-87-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, Applicant v. Briecan Const. Limited, Respondent

Bargaining Unit - Certification - Construction Industry - Employer - Whether rebricking of furnace in a smelter plant is maintenance or construction work - Respondent found to be an employer in the construction industry - Certificates issuing

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *A. J. Ahee*, *B. Whitehead*, *M. Zangari* and *R. LaForest* for the applicant; *K. R. Valin* and *Wilfrid Dupuis* for the respondent.

DECISION OF INGE M. STAMP, VICE-CHAIR, AND BOARD MEMBER J. REDSHAW; May 1, 1989

1. This application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act* was scheduled for hearing to deal with a number of issues as outlined in decisions of the Board, differently constituted, dated November 25, 1987 and January 11, 1988.

2. On the day scheduled for hearing this matter, the first issue the Board dealt with was whether the documents filed by the applicant purporting to be evidence of membership in the applicant constitute evidence of membership within the meaning of section 1(1)(l) of the Act. The applicant in the instant application for certification filed membership evidence which on its face does not clearly state that any money was paid to the applicant on account of initiation fees or union dues, nor is there any clear statement that anyone on behalf of the applicant collected the money.

3. After considering the *viva voce* evidence adduced by the applicant and the submissions of the parties, with respect to the sufficiency of the membership evidence, the Board was satisfied that the money was in fact paid to the applicant on account of initiation fees. The Board was therefore satisfied, on the basis of all the evidence before it, that the membership evidence filed by the applicant meets the requirements of section 1(1)(l) of the Act, and made an oral ruling to that effect.

4. The second issue before the Board is whether or not this application is properly brought under the construction industry provisions of the Act. The positions of the parties are set out in paragraph 4 of the Board's decision (differently constituted) dated January 11, 1988, which reads as follows:

4. The respondent concedes that the employees who were the subject of this application were its employees during the material times but asserts that it is not, and was not during the material times, an employer in the construction industry within the meaning of section 117(c) of the Act. In essence, the respondent asserts that its employees, and specifically the one affected by this application, were performing maintenance work, as opposed to construction work, for Kidd Creek Mines Ltd. in Timmins and that this application is not properly brought under the construction provisions of the Act. The applicant, which seeks to be certified for its standard bargaining unit of plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors of the construction industry in Board Area 19, save and except non-working foremen and persons above the rank of non-working foreman (and also request a clarity note declaring that welders working at the plumbing and steamfitting trades are employees included in the bargaining unit), maintains that there were such persons employed by the respondent doing construction work during the material times.

5. The Board heard the evidence of Wilfrid Dupuis, the Kidd Creek Mines Ltd.'s General Foreman in charge of maintenance in the smelter plant. Briecan Const. Limited ("Briecan") has a contract with Kidd Creek Mines Ltd. ("Kidd Creek") to supply maintenance manpower as needed. A few days prior to the application date, a major outage (also known as a "shutdown") commenced at Kidd Creek. This was the eighth shutdown since 1980 and Kidd Creek has been able to reduce the frequency of these shutdowns from every six months to eighteen months due to improved refractory brick for the smelter. Apart from the major shutdowns of approximately thirty-five days, there are also mini shutdowns of twelve hours as well as routine day-to-day maintenance work.

6. There are four crews within the smelter complex to maintain the equipment of the smelter plant related to the operation. Each crew is made up of all the trades required to handle ongoing maintenance tasks. A few days prior to this application, a major shutdown was scheduled to

begin. Kidd Creek made a determination as to how much additional manpower was required during the shutdown to augment its own maintenance forces. There were approximately 235 Briecan employees at Kidd Creek throughout the operation with approximately 80 employees in the crew supervised by Mr. Dupuis.

7. The work that is the subject of this application was performed in the smelter plant and was part of the rebricking of the furnace, which included crashing the roof containing refractory bricks and copper blocks, removing the pipes, replacing the bricking inside, repiping and testing the copper blocks. The old pipe is scrapped and although it could have been reused, it is more efficient to use new pipe.

8. Kidd Creek supervision was assigned to Briecan employees. No blueprints were used in the rebricking of the furnace. The experience of successive shutdowns enabled Kidd Creek to rebrick and repipe without blueprints. It is the evidence of the Kidd Creek representative that the furnace was "only restored and not changed in any way". There were some modifications as there had been in the other "campaigns" (shutdowns). During each shutdown, more is learned about the heat problem and how to extend the life of the refractory bricks in order to extend the time between shutdowns. The modifications to the furnace this time included the adding of two 10 ton copper blocks used in the cooling process, as well as repositioning the existing copper blocks for maximum cooling efficiency. It is only during a shutdown that there is access to these cooling blocks. Approximately 10% of the shutdown work on the furnace involved piping.

9. The two copper blocks were installed by another contractor with Briecan working on the piping system that interacted with the installation of the two additional blocks. There are approximately 80 cooling blocks in the furnace, and the only opportunity to test these blocks is during the shutdown, when approximately eight to ten copper blocks were replaced together with the required replacement piping. Both Kidd Creek and Briecan employees worked on the piping.

10. Additional cooling lines (1" diameter water pipe) were installed around the two new copper blocks. In order to conserve the expensive use of water, a decision was made to "twin" the two new blocks. There were approximately a dozen blocks that were already twinned. The Kidd Creek representative testified that there were approximately 50% Briecan and 50% Kidd Creek employees, gasfitters and welders, working on natural gas piping around the smelter, including work on valves and regulators. A number of bypasses were done to facilitate future repairs to the regulators without shutting down the gas line. Briecan forces did most of these bypasses. The bypasses were fabricated by Briecan forces in the Kidd Creek maintenance shop. Approximately 80% of the bypasses were done by Briecan forces and 20% by Kidd Creek.

11. When rerouting the gas line, some flanges had to be replaced due to wear and tear. The existing line had gas meters which were removed because they malfunctioned and replaced with new meters. The Kidd Creek representative stated that it "probably was 50-50, Kidd Creek and Briecan forces" that worked on the gas lines, as Kidd Creek's policy on any critical work is to have one Kidd Creek to one contractor employee.

12. The applicant called four steamfitters and three welders to give evidence with respect to the work they did on the application date. The applicant's evidence generally corresponds with that of the respondent. Work was performed on the cooling system including the new copper blocks, 1" and 2" piping, headers (welding and threading), a new 4" take-off line from the 6" watermain, valves, flanges, the installation and fabrication of the gas bypass system including new meters. Each meter had its own bypass. The old system was cut out and replaced. Briecan employees performed "hundreds of gas welds" according to one witness.

13. The following is a summary of the extensive submissions and cases cited by both parties in support of their positions in this matter.

14. The respondent takes the position that it does not operate a business in the construction industry, but rather is an employer engaged in maintenance. If a minority of the work is found to be construction, the respondent contends that the appropriate unit is an industrial unit due to the intermingling of Briecan and Kidd Creek forces and because of the mix of construction and non-construction work. Further, the respondent submits since Briecan's employees are working side by side with Kidd Creek maintenance employees doing the same work and are supervised by Kidd Creek's General Foreman, and since Kidd Creek is not in the construction business but in the mining and smelter business, Briecan has to be considered as being in the same business for the purpose of this application.

15. It is the respondent's position that it would make no labour relations sense to create a construction bargaining unit for a small part of the maintenance crew. In the respondent's view, it would lead to fragmentation and jurisdictional disputes and destroy the relationship which now exists in a mine site such as Kidd Creek. In support of its position, the respondent cited two *Kidd Creek* decisions, [1984] OLRB Rep. Mar. 481 and [1986] OLRB Rep. June 736. The respondent referred the Board to the former with respect to what work is considered maintenance as opposed to construction.

16. On the nature of the work, it is the respondent's position that the work is maintenance. Unlike *Inscan*, [1986], OLRB Rep. May 640, the furnace did not cease to function; it was stopped for routine maintenance and inspection and is distinguishable from that case. New piping replaced the existing piping and that the piping was new is not relevant to the determination of the nature of the work performed. The old piping could have been reused. The new cooling blocks, the twinning of some blocks and the bypasses on the gas line, as well as the new meters was work done to maintain, not to improve, the furnace's capacity and therefore, falls within the definition of maintenance, not construction.

17. The respondent contends that had Kidd Creek done the work with its own forces, it would have been found to be maintenance as the prior *Kidd Creek* cases found. The respondent also cited *Gallant Painting*, [1987] OLRB Rep. March 367, and *Master Insulators Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 for the distinction between construction and maintenance.

18. The respondent cited the following cases for the proposition that an all employee unit is appropriate if some construction work was done and a finding is made that there was a mix of activities: *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962 and *Dominion Paving Limited*, [1981] OLRB Rep. Oct. 1370. The respondent submits that if the Board found some of the work to be construction, it will also have to find that the work is completely interchangeable. There was no distinction made by Kidd Creek between their own employees and Briecan employees - they were totally integrated. The respondent submits that it does not matter for the purpose of his argument that Kidd Creek was not a party to the proceeding. It is the nature of the work performed that is relevant. The percentage of the mix is not important. If both construction and non-construction work is done by the same employees, then an industrial bargaining unit is appropriate. The respondent contends that the applicant is applying under the wrong section of the Act and that this application should be dismissed.

19. The applicant submits that there is a threshold issue of what work was performed. The position of the applicant is that the work performed during the shutdown, in particular the two cooling blocks that were added and the modifications made to the furnace "made the operation

more efficient” on the respondent’s own evidence. The cooling system was enlarged and enhanced in order to extend the life of the refractory brick and to cut down on the frequency of shutdowns - if the furnace runs longer it puts out more product. Twinning of the cooling blocks was designed to make the furnace more cost-efficient by saving on water used in the cooling process. The fact that new piping was used when repiping is not determinative of whether the work is construction or maintenance. New water lines from the existing water main were installed for the new cooling blocks. New magnaflux meters with bypasses were installed on the gas lines to the furnace to make the operation more efficient. The repair and modification to the gas lines facilitate maintenance but is not regular maintenance. The applicant’s members were not intermingled with Kidd Creek employees, but rather both Briecan’s and the owner’s forces were working in the Smelter plant.

20. It is the applicant’s submission that the work in dispute is work that falls within section 1(1)(f) of the Act and is construction work. The way in which the work is perceived by Kidd Creek does not affect this application. In *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613, the owner/client performed the work. They were found to be an employer in the construction industry. The second issue is whether Briecan is an employer in the construction industry for the purpose of the construction industry provisions of the Act. The applicant contends that its members performed construction work on the date of application, and that it met the test of what is construction work as set out in paragraphs 28 & 29 of *Master Insulators, supra*, in that the work performed made the furnace more efficient and easier to maintain throughout the year.

21. The applicant cited *Abitibi, supra*, for its position that it is entitled to bring an application pursuant to section 144(1) of the Act for its craft. In *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220, the Board stated that it would look at the work performed on the date of application in the construction industry. In the applicant’s view, *Ethier, supra*, does not apply in this case since there the respondent employer operated two distinct businesses and the applicant was not a union with a history in the construction industry. This is not the situation here. In *Dominion Paving, supra*, no members of the applicant were at work on the date of application. In the instant application before the Board, pipefitters and welders were at work on the date of application performing construction work.

22. The applicant argues that if Briecan is engaged in construction work, the applicant has a right to be certified for their craft unit. This does not in any way impact on the respondent’s operation. There is no evidence before the Board as to what the other Briecan employees were doing outside the smelter plant. The *Kidd Creek* cases do not apply to this situation. The IBEW wanted to carve out an IBEW maintenance unit from a larger maintenance unit. The applicant’s position is that their members were in the smelter plant for a specific purpose and a specific period of time. The applicant submits that it has met the criteria in section 6(3) as set out in the *Kidd Creek* cases and the Board should issue a certificate.

23. There are two related issues before the Board: 1) whether the work performed on the application date is construction work as defined in the Act, and 2) whether Briecan is an employer in the construction industry. The relevant sections of the Act are clause (f) of section 1(1) and clauses (b) and (c) of section 117. They provide as follows:

1.-(1) In this Act,

...

- (f) “construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

117. In this section and in sections 118 to 136,

• • •

- (b) “employee” includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;
- (c) “employer” means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

24. The Board has stated in a number of cases that if an employer employs workers performing construction work he is then an employer in the construction industry for purposes of the construction industry provisions of the Act. In *Ridsdale Steel Fabricators, Inc.*, [1987] OLRB Rep. April 601, the Board states in paragraph 10:

Nowhere in the Act is it stipulated that a person must operate a business that is engaged solely or even primarily in the construction industry in order for that person to be an employer in the construction industry. Nor has the Board required that a person's business be operated solely or primarily in the construction industry in order for that person to be an employer in the construction industry (see, *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 and the Board decisions cited therein at paragraph 10). Similarly, there is no requirement that an employee perform a majority or any of his work on a construction site in order to be an employee in the construction industry. It is sufficient for an employee to be “commonly associated in his work or bargaining with on-site employees”. Consequently, it is not correct, in our view, to say that an employer engaged in construction and non-construction activities with the same work force cannot be an employer in the construction industry.

25. This brings us to the issue of whether the work performed by the employees that are the subject of this application falls within the definition of construction work pursuant to the *Labour Relations Act*.

26. In our view, the *Kidd Creek* decisions are distinguishable. The applicant was trying to carve out a group of employees performing maintenance work from a larger maintenance group of one employer. It was not an application pursuant to the construction industry provisions of the *Labour Relations Act*. A lot of evidence was heard about what in the IBEW's opinion was maintenance work and we would only note that in paragraph 46 of the earlier *Kidd Creek* decision the Board stated:

46. The other problem is, that in this situation, the term “maintenance work” really has no precise meaning. Not only is such work done pursuant to the ICI agreement at construction rates, but much of it may actually be construction work. The definition of maintenance varies as one moves from I.B.E.W. Local to I.B.E.W. Local; moreover, the witnesses had quite different (and sometimes bizarre) characterizations of work which, in their view at least, was “clearly” maintenance - as opposed to construction.

27. In the case before us, there is only one respondent, Briecan. The type of work done by Kidd Creek forces can have no bearing on the instant application for certification. In the absence of any section 1(4) or 63 issues being raised, the nature of the work done by Kidd Creek employees is irrelevant for the purpose of this application.

28. With respect to the “mixed activities” cases, *Ethier, supra*, and *Dominion Paving, supra*, are both distinguishable from the facts in this case. In *Ethier*, the applicant was not found to be a trade union “that according to established trade union practice pertains to the construction industry”. In *Dominion Paving*, no construction trades were at work on the date of application and

the bargaining unit was restricted to employees in non-construction. The evidence before us is that Briecan had a contract to do maintenance work at Kidd Creek. The Briecan employees included a number of trade classifications which are also common to the construction industry.

29. With respect to the nature of work that was performed on the date of application, the date the Board looks at in an application in the construction industry, we are satisfied that the nature of the work meets the criteria set out in *Master Insulators*, *supra*, and *Inscan*, *supra*. *Master Insulators* in paragraphs 28 and 29 states:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. *Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, insofar as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.

[emphasis added]

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". *In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work.* "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

The Board, following the *Master Insulators* in paragraphs 20 and 21 of the *Inscan* decision states:

20. The Board, having found at paragraph 28 that the work at the Fearman and Stelco plants was work within the ICI sector of the construction industry and the remaining work was to be regarded as maintenance work, seems to be offering in the emphasized words in paragraph 29 a definition of maintenance and repair by which to distinguish the remaining work from work which might be captured by the word "repair" in section 1(1)(f). Since the Board ultimately found that the remaining work, which it regarded as maintenance work, was not captured by the scope clause of the provincial collective agreement, that is the construction agreement, it is reasonable to conclude that it also was not captured by section 1(1)(f). It is no less reasonable, then, to conclude that repair work defined as work "...necessary to restore a system or part of a system which has ceased to function or function economically ..." is captured by the section 1(1)(f) definition of construction just as certainly as it captures work "...which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility." Those were the words which the Board used in paragraph 28 of its decision to distin-

guish the work it regarded as “new construction” from the rest of the work which it regarded as maintenance.

21. The definition of repair work as work necessary to restore a system or part of a system which has ceased to function or function economically certainly fits the work performed by Inscan at the Clarkson Refinery. Richard Ives’ graphic description of the fire damage to the hydrotreater was that both stages of the unit were producing product the day before the fire and incapable of producing it the day after. It was three weeks before the second stage could produce its normal product. There is no doubt that the hydrotreater ceased entirely to operate for three weeks. The installation by Inscan of the replacement insulation on piping and equipment was part of the exercise of restoring normal function to both stages of the hydrotreater. That is work in the construction industry as defined in section 1(1)(f) of the Act and clearly is work within the industrial, commercial and institutional [“ICI”] sector of the industry.

30. In *Gallant Painting, supra*, the Board found that the painting was done for the primary purpose of sustaining and protecting operating systems and was therefore maintenance. This is not inconsistent with *Master Insulators* or *Inscan* and is distinguishable from the instant case.

31. The key words “work necessary to restore a system or part of a system which has ceased to function or function economically” and “work which involves the addition to an existing facility or which will increase the production capacity of an existing facility” can be applied to the work performed at the smelter plant at Kidd Creek. In *Quinard Limited*, [1982] OLRB Rep. July 1054, the Board in paragraph 9 stated:

9. It is the contention of the respondents that the purpose of the work in question is to preserve the functioning of an existing system and hence according to the reasoning of the Board in *Master Insulators Association of Ontario Inc.* [1980] OLRB Rep. Oct. 1477, the work should be regarded as maintenance work. We are unable to accept this contention. To the extent that work is done on existing equipment and piping to keep it functioning properly, we agree that it can properly be classified as maintenance work. However, in the instant case, large pieces of existing equipment are being taken out of the production process and replaced by new equipment. Piping has to be attached to all of the new equipment and a certain amount of additional piping installed. In our view, the removal of large pieces of equipment forming part of the existing production system, and the installation of new equipment along with the related piping work, goes beyond simple maintenance work and constitutes work which comes within the construction industry. We are further satisfied that it is work within the ICI sector.

32. In order to determine whether the work performed by the applicant’s members is construction work as defined in the Act, it is useful to look at the context in which the work was performed. The furnace had ceased to operate. The fact that it was shut down to replace the worn-out refractory brick does not alter the nature of the work. The definition of construction in section 1(1)(f) of the *Labour Relations Act* includes “... repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof”. In order to replace the refractory brick, the furnace had to be “crashed” and the piping cut out. This demolition work is defined as construction work under the Act. The work of making the furnace operational again is beyond routine maintenance work and is repair work as defined in *Inscan, supra*: “... work necessary to restore a system or part of a system which has ceased to function or function economically...”. The additions and modifications that were made during the shut-down clearly were done to improve the cooling system, conserve valuable water resources and facilitate easier maintenance on the new meters without having to shut off the gas. All of the work performed in connection with the rebricking or restoring of the furnace, whether demolition, repair or new construction is construction work as defined in the Act.

33. Having regard to all the evidence before us, the submissions of the parties and the cases cited, the Board finds that the work performed on the date of application by members of the applicant is construction work as defined in the *Labour Relations Act* and that the respondent is an

employer who operates a business in the construction industry pursuant to section 117(c) of the Act.

34. Having regard to the evidence before us and the earlier decisions in this matter, the Board finds that pursuant to section 144(1) of the Act, all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

35. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 5, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

36. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 of decision dated January 11, 1988 in respect of all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

37. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

DECISION OF BOARD MEMBER W. GIBSON; May 1, 1989

1. I dissent from the majority decision.

2. For the following reasons, I believe the work carried out by Briecan on the date of application was maintenance work, previously defined by the Board as work "to sustain and maintain an operating facility, and to enable that facility either to *operate efficiently*, or to attain its designed or production capacity" (*Master Insulators Association of Ontario Ltd.*, [1980] OLRB Rep. Oct. 1477):

- (i) The contract between Kidd Creek Mines and Briecan Construction called for Briecan to supply *maintenance* manpower as needed.
- (ii) By *viva voce* evidence the Board heard that Kidd Creek made a determination, a few days prior to the shutdown, as to how much additional manpower was required to *augment* its own *maintenance* forces. Although Kidd Creek has a permanent crew employed year-round on maintenance duties, it is obvious that, over a shutdown period when the plant is out of production, maximum possible manpower must be applied so that the plant is back on stream as soon as possible. Kidd Creek could not maintain a permanent maintenance crew year-round at this peak level.
- (iii) Kidd Creek's supervision was assigned to Briecan employees who work side by side with Kidd Creek employees doing the same work. Kidd Creek is not an employer in the construction business.
- (iv) Over the course of time, by means of improved materials and improved technology, Kidd Creek has been able to reduce the frequency of these shutdowns from every six months to every eighteen months. The work in dispute here was carried out for the production capacity to be sustained for even longer periods between shutdowns.
- (v) The major portion of the work involves the periodic replacement of the refractory brick, and Kidd Creek is constantly working to improve the cooling process so that the refractory brick retains its efficiency for a longer period. The addition of 2 more copper blocks, with the additional 1" cooling lines, is clearly for this purpose.
- (vi) Also, the installation of a number of bypasses to the gas regulators so that they can be serviced in the future without shutting down the gas line, is designed to simplify the maintenance of these regulators.

3. Briecan, on the date of application, was not an employer in the construction industry within the meaning of section 117(c) of the *Labour Relations Act* because its employees were engaged in maintenance work. This application should have been brought under the general provisions of the Act, *not* the construction industry provisions.

2354-87-R; 2310-88-U United Food and Commercial Workers International Union, Applicant/Complainant v. **Coca-Cola Ltd.**, Respondent v. Group of Employees, Objectors

Certification Where Act Contravened - Change in Working Conditions - Interference in Trade Unions - Unfair Labour Practice - Union alleging that employer failed to give its usual annual wage increase during the freeze - Reasonable expectations of employees contain an objective element - No breach of freeze - No interference with trade union - Ballots cast in representation vote ordered counted

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *D. G. Wozniak* and *H. Peacock*.

APPEARANCES: *E. Posen* and *B. Hill* for the applicant/complainant; *M. Farson*, *M. MacKillop* and *H. Maeots* for the respondent; *D. Davidson* and *J. Hogan* for the objectors.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER D. G. WOZNIAK; May 15, 1989

1. This is a complaint under section 89 of the Act that the respondent company has breached section 64, 66, 70 and 79 of the Act, with an accompanying request for certification pursuant to section 8 in the related, continuing certification application.

2. The Board has issued three decisions related to this certification application and prior related section 89 complaints as follows:

March 31, 1988 - concerning the voluntariness of a petition in opposition to the union.

July 7, 1988 - concerning four section 89 complaints of lay-off and demotion for union activity. (Files 2435-87-U; 2787-87-U; 2788-87-U; 2789-87-U).

January 5, 1989 - concerning the community of interest of the company's Belleville service employees.

3. The applicant union applied for certification on November 23, 1987 thus triggering the freeze provisions in section 79(2). The "freeze" was still in effect at the time of the hearing of this matter. This complaint concerns an allegation that the company has failed to give its usual annual increase, following the settlement of the company's unionized operation in Ottawa. The union says that to give the increase would have been the "business as usual" approach proper under the freeze provisions as interpreted by the Board. The company agrees that there was a pattern of annual wage increases but disagrees as to how it should be described. The company describes the pattern as that the Kingston raises follow the raises in other comparable units. Prior to 1987 the rate at Ottawa was bargained with the rest of the unionized locations in Ontario. The unionized Ottawa and non-unionized Kingston plants were the only two plants managed out of Ottawa. After 1987 two things changed; Ottawa no longer bargains jointly with the rest of the province and the company has acquired two new plants within the Ottawa region, Renfrew which is unionized and Cornwall which is not. As of the date of the hearing, no raises had been implemented in either non-unionized plant, Cornwall or Kingston. The Ottawa contract was signed in October 1988 but the Renfrew contract was not ratified until late February 1989, and had not been signed at the time of the hearing of this complaint. The company maintains that at the time of the complaint, filed in December 1988, after the Ottawa settlement, but before the Renfrew one, there was no pattern

established which would dictate that a raise should have been given by that date. The company argues that no distinction has been made between the non-union plant with a certification application and that without; the same factors have been applied.

4. The company also points to the fact that at least on one occasion before 1987 the raise was not "sorted out" until February because the matter had to go to the Anti-Inflation Board (A.I.B.). In every case, including that one, retroactivity was paid back until July and there is no intention to deviate from that this year. When the raise is ascertained it will be retroactive to July. Therefore the company takes the position that there was no violation in the company's failure to implement a raise by the date of the complaint.

5. The company also characterized the certification application as a change to the status quo to the extent the company had never had to grant the Kingston employees an increase only to have them be entitled to bargain for more money after it, as would be the result if the union is certified. However, the company says that now that the Renfrew negotiations are concluded, it is able to come to a decision as to an increase retroactive to the traditional anniversary date but will await the outcome of the Board's decision before acting on this.

6. The application for certification under section 8 was not set out in the initial complaint filed in December, 1988, the complaint centring on the allegation of breach of section 79(2), the "freeze" provisions. It was made in correspondence after the Board's January 5, 1989 decision on the community of interest issue in the certification application, which resulted in the Board's ordering a representation vote. The company argues that the effect of the union's section 8 application is a request for reconsideration of the decision to order a vote at the end of the community of interest decision. The company submits that the Board should not undertake such a reconsideration, because although the Board has the jurisdiction to do so, it does not ordinarily exercise the power to reconsider unless there is reliance on evidence which could not reasonably have been foreseen in the original hearing. In general the company takes the position that it would require much more flagrant conduct than that present in this case to warrant certification without a vote under section 8.

7. Mr. Davidson on behalf of the objecting employees submitted that it was very important to the employees to have a representation vote so that this matter does not just become a fight between the union and the employer without the wishes of the employees being addressed. He submits it would be the democratic thing to do for the Board to order a vote to allow the employees the right to express their opinion with a minimum of pressure in a secret ballot.

8. In argument the union emphasized that as far as the employees were concerned benefits would flow retroactively to Kingston after the Ottawa contract was signed. It maintained that the changes in the system that occurred as a result of the acquisitions of 1987 fall short of evidence of a plan adopted before the certification application which would justify treating Kingston differently than before, which it says would be necessary in order to avoid a finding of a breach of the freeze provisions. It maintains that the acquisitions themselves are not evidence of a long range plan or any determination that Kingston would have to wait for the new plants to settle before a wage increase would be given. Up until the date of the certification application these employees would normally receive the Ottawa increases directly after the settlement.

9. The union further argues that section 64 was breached by the company's sending a penalty message, i.e. "if you choose to be represented by a union you will not get your annual increase at the time you usually do", and that the Kingston employees have been discriminated against contrary to section 66 because they chose to join the union. It characterizes the company's holding the benefits and advances which would normally have come their way as a pecuniary penalty to them

for the certification drive. It also says the company has taken direct action against members of the bargaining unit which constitutes intimidation so that they might not continue to be represented by the applicant contrary to section 70. However, its argument relied most heavily on a breach of section 79(2), submitting that the evidence is clear that the wage-rates were directly tied to Ottawa. The union says that management's linking of the failure to give the increase directly to the application for certification in the conversation set out below shows the company's true intent and the fact that its correspondence with the union does not mention the plants at Renfrew or Uxbridge indicates that the new acquisitions were not the real reason for the change in procedure.

10. The union submits that the contravention of the Act is clear as argued above and that this results in a situation where the true wishes of the employees will not be obtained in a secret ballot vote because of the chilling effect of the activities of management. The union argues that the employees' economic security is jeopardized by the failure to implement the Ottawa wage increase and that this is why section 8 should be applied. Further the union argues that there is sufficient support for collective bargaining.

11. We will first deal with the "freeze" provisions. The Board's jurisprudence in this area has developed a purposive interpretation of section 79 so that an employer is not prohibited from making any change in wages while the freeze is in effect; it is prohibited from making changes that would be a departure from "business as usual" or the "reasonable expectations" of the employees. This purposive interpretation of the statute has been supported in a large number of decisions. In *Anderson's City Farm Valu-Mart*, [1987] OLRB Rep. Jan. 1, for example, the Board said as follows at paragraph 6 and 7:

6. The jurisprudence pursuant to section 79 of the Act makes clear that the purpose of this freeze provision is to preserve a defined and understood status quo during this period with the overall objective of facilitating a stable environment within which parties can concentrate on meaningful collective bargaining. Although it is not easy in every case to identify what this defined and understood status quo entails, particularly where there has been no prior collective agreement or where the contentious event is a first occurrence, recourse can always be had to the language of section 79 with this purposive interpretation in aid. The development by the Board of flexible interpretive tools such as the "reasonable expectations" and "business as usual" tests are evolutionary illustrations of a long-standing practice of construing the section in a way which acknowledges the sanctity of its purpose, recognizes the limits of ability to be categorical, and authorizes a singular determination in every case based on existing jurisprudence but dependent on the factual variables before the panel. In other words, the integrity of the status quo will not be permitted to be violated, but respect will be paid to the possibility that it is not every change which violates this integrity.

7. If one views the section as intending to freeze a status quo, then one must assess the impact of the change on the range of expectations expected to be frozen during this period. From the union's point of view, does the change interfere with its reasonably expected representation rights and duties or with its ability to execute them? From the employees' point of view, does the change interfere with terms, conditions, rights duties or privileges of employment previously enjoyed and reasonably expected to continue. And from the employer's point of view, does the change interfere with any of his or her rights, privileges or duties reasonably arising out of a pre-existing pattern of management in the particular business?

Similarly, in *Forintek Canada Corp.* [1986] Apr. OLRB Rep. 453, the Board said the following at paragraphs 38 and 39:

The purpose of the "statutory freeze" imposed by section 79 is to maintain the prior pattern of the employment relationship in its entirety while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. Reference to the purpose of sec-

tion 79 is important because the application of its language to particular fact situations is not always a simple task. The *status quo* of an employment relationship may include the recognized prospect of change. The interpretive problem this creates is most easily illustrated by the apparent dilemma of an employer considering whether he should or should not implement during the freeze a wage increase which he would otherwise have given because he had made a promise to do so before the events which triggered the freeze: Whatever he does will alter either the wage rate or a pre-existing right to a wage increase. Another less immediately obvious tension in the statutory language is that created by the simultaneous preservation of pre-existing wage rates and other terms and conditions of employment on the one hand and pre-existing employer rights and privileges on the other. In a first contract situation, those pre-existing employer rights and privileges might be said to include the right or privilege to make unilateral changes in pre-existing wage rates and other terms and conditions of employment, but if the section were interpreted as preserving all such managements rights it would be rendered meaningless. See *Sunnycrest Nursing Home*, *supra*, at paragraph 44; and, *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609 at paragraph 21.

39. These and other difficulties with the literal meaning of the words of the section have led the Board to adopt a purposive "business as before" interpretation of section 79, which requires that an employer continue to run its operation according to the pattern established before the circumstances giving rise to the freeze occurred: *Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859. The elements of the prior pattern are ascertained from the perspective of employees - a pre-freeze decision to alter wage rates or working conditions may not be implemented unilaterally during the freeze period unless the decision was also communicated to employees before the events which triggered the freeze: *Carleton University*, [1978] OLRB Rep. Feb. 184; *LePatro de'Ottawa*, [1983] OLRB Rep. Feb. 244. Indeed, the importance of the employees' perspective to a purposive analysis of section 79 underlies the recent evolution of the "business as usual" approach into the "reasonable expectations of employees" test applied in *Simpsons Limited*, [1985] OLRB Rep. April 594.

12. The practice of the employer in managing the operation was intended to be incorporated in the "reasonable expectations of employees" test, *Simpsons Limited*, *supra*, at paragraph 33. It is therefore necessary to determine what the pattern prior to the freeze was and whether or not it has been altered as seen from the point of view of the reasonable expectations of the employees. We therefore turn to the evidence. We heard testimony from Bob Hill, former Executive Secretary of the Soft Drink Workers' Board, which is affiliated with the applicant union, and three workers from the Kingston plant on behalf of the union and H. Maeots on behalf of the company.

13. It is common ground that until 1987 the negotiations with Coca-Cola's Ontario unionized plants were done jointly, resulting in one standard agreement for the province. At these joint negotiations the General Manager in charge of Ottawa and Kingston was usually present. The Ottawa collective agreement was negotiated in these joint negotiations until 1988 when Ottawa was not part of them, for reasons that were not explained in evidence. Nor was there evidence concerning the timing of any post-freeze joint negotiations. However, Mr. Hill testified that the Ottawa collective agreement negotiated in 1988 was basically similar to the other Coke collective agreements. Mr. Hill said that Kingston's wage rates were identical to the rest of Ontario before the freeze. In every year since 1975 after the contract was negotiated for Ontario, the Kingston people were given the same increase retroactive back to the effective date of the collective agreement. He said, there was "no difference in Kingston than any other location."

14. At a meeting in mid-September 1988 of the sales employees in Kingston one of the employees asked Mr. Rider, the Kingston Manager, about adjustments in wages and when they would be forthcoming. Mr. Rider did not answer the question but asked if Mr. Balfour, one of the salesmen, would come into his office and he could explain it to him so that Mr. Balfour in turn could explain it to the others. Mr. Balfour and another employee went to Mr. Rider's office where they were told that because of the union organizing drive the raise could not be given because the

increase might be interpreted as a bribe. Mr. Balfour reported this back to 12 to 15 drivers and warehouse employees who asked him about it.

15. When the employees in Kingston heard that the Ottawa collective agreement had been signed October 13, 1988 and that they had not yet received their increases, an employee contacted the union. Union counsel then wrote to the employer relating the conversation between Mr. Balfour and Mr. Rider, indicating that although the union had not been asked to consent to the alteration of wage rates, they were willing to do so. He requested an immediate adjustment to wages retroactive to July 1988. This produced the following reply from Mr. H. Maeots, the company's Area Human Resources Manager, Central and Western Canada for the last 12 years.

"I am writing in response to your letter to Bob Rider dated November 21, 1988. The company acknowledges your consent to and request for an adjustment in wages following increases negotiated recently in some other bargaining units. As you may know, over the years the company has generally attempted to maintain comparable wage rates between unionized and non-unionized locations in near proximity. Such attempts, however, have not amounted to a commitment from the employer or a condition of employment.

Since a certification application is now pending at the Kingston location, the matter of wage rates may soon be the subject of collective bargaining. Your request for a wage raise before negotiations commence is essentially an attempt to raise the point of departure for bargaining to a level much higher than the level from which other bargaining units negotiated their current rates. Such a significant monetary advantage over other units of employees would represent a marked departure from the status quo that the company is not willing to make."

16. Mr. Maeots explained the wording "comparable wage rates between unionized and non-unionized locations in near proximity" as there not being just one pattern setting agreement anymore. The Ottawa Region which, had formerly only one comparison - Ottawa, now contains Renfrew and Uxbridge (unionized plants), as well as Cornwall and Kingston (both non-unionized).

17. Mr. Hill indicated that attendance at union meetings that he had called in Kingston had steadily declined since July of 1988. Notice of meetings is given by word of mouth. At the July, 1988 meeting 12 employees showed up, at the December meeting, seven, and at the January meeting six. Almost everyone had turned out at the first meeting in October 1987. There was another one two weeks later at which 75% of those who attended the first one came. Otherwise, there had been small group meetings during the organizing campaign.

18. Mr. Hill was not aware that the Renfrew contract had been signed a week before the hearing of this complaint. The workers at the Renfrew plant have been represented by a bargaining agent (not the applicant) since 1978, before the acquisition by the respondent and was never part of joint negotiations. There was no evidence as to when Renfrew settled in previous years under the prior ownership or with what relationship to the provincial pattern of negotiations between these parties. He could not swear whether the Renfrew agreement had any bearing on Kingston's rates prior to this round of bargaining. He was aware that there would have been several sets of negotiations rather than one provincial one during this round of negotiations and that the Uxbridge plant had signed a collective agreement. In answer to counsel's question whether it was his understanding that the July date was the effective date and the implementation date was anywhere from October to February, he responded "it may be." Mr. Hill said that in the past the Uxbridge wages and benefits did bear a relationship to the adjustment of wages and benefits at Kingston, but did not detail that relationship.

19. David Balfour, who had the conversation with Mr. Rider set out above, was a driver at the Coca-Cola plant in Kingston until December 29, 1988. He testified that the Kingston increases in wages and benefits had been tied to the Ottawa plant, that "whatever they got we got." He

thought they were retroactive to the signing of the Ottawa agreement. Other evidence indicated they were retroactive to approximately the anniversary date of the agreement, in July. Similar testimony about his understanding of the wage increase was given by another driver, Mr. George Kincaid, who had worked in the Kingston plant for 19 years. However, he had read the Ottawa contract two or three times because "we always were not sure what we were getting." Mr. Balfour told him that Mr. Rider "was not too up on labour relations" but felt that a wage increase would be interpreted as a bribe - that the company would be saying they did not want the union if they gave the increase; Mr. Kincaid explained this to others. He said the subject of the wage increase became the topic of heated discussion in the plant with people becoming divided for and against the union about it. Mr. Brian Seymour, a warehouseman for more than five years, also was of the view that Kingston would receive whatever Ottawa got as a wage increase. He had heard little discussion of the increase in the warehouse.

20. Mr. Maeots testified on behalf of the company that there were nine plants in Ontario up until 1987. After 1987 there were 21 plants in Ontario because of an aggressive acquisition program. Of the nine plants prior to 1987, eight were unionized, Kingston being the only exception. Mr. Hill testified there were seven unionized plants, but nothing turns on the discrepancy. Up until that time there were 12 bargaining units in eight locations all of which were bargained jointly at the same negotiating table. Since 1987, 15 of the 21 plants are unionized, including the eight owned prior to 1987. The company now deals with three unions, 20 separate agreements and seven sets of negotiations.

21. Mr. Maeots testified that in the past, the wages and benefits at Kingston had been substantially the same as those of Ottawa but not identical, there being variations in the wages in some classifications. He said that the manner in which the company arrived at the increases for Kingston was that it looked at the general economic situation but the heaviest factor was Ottawa and the joint settlement there. The company tried to maintain comparable wage and benefit packages. What has changed is that there are now more factors in the formula.

22. Kingston is directed by the same management team as Ottawa. In the past year the company has acquired plants in Renfrew and Cornwall which are also directed by the Ottawa team and serve as distribution points for Ottawa production. In October, 1988 when the company had concluded the Ottawa negotiations it was facing expiration of the contract in Uxbridge one month later and the Renfrew contract two months later. Mr. Maeots said the question arose as to what Kingston's rate should be now that there were three comparable outfits, one settled and one not, rather than the one, Ottawa, prior to this time. He said that when they had just nine plants and 12 agreements they used Ottawa as the bench mark because Kingston was part of the Ottawa operation, with the same management team, and was geographically the closest. Cornwall, the recently acquired non-union plant, has also had its increase delayed pending the resolution of the Renfrew contract. Mr. Maeots said he anticipates the Kingston increase to be retroactive to July, whenever it is established. He testified that the implementation and the effective date at Kingston had been different in negotiating years. Where a multiple year contract has been negotiated the company knows in advance when the increase is coming and is able to implement on the exact July anniversary date. Mr. Maeots produced memos implementing the wage increases back to 1978 in the negotiating years. In 1978 the increase was implemented on February 13, 1978 retroactive to July 28, 1977. The employees had been advised in January, 1978 that the union contracts had been signed but had to be submitted to the A.I.B. and that the wage rates would be adjusted once the A.I.B. had given a ruling. The suggested outline of announcement to employees in January 1978 concluded with this sentence:

Thus you will continue to enjoy exactly the same wages and benefits as all other locations without, of course, the deduction of \$3.50 per week for union dues.

The increase was implemented in February, 1978 retroactive to July 28, 1977 despite the fact that the A.I.B. had not produced a ruling as yet. The covering memo attached to the rate increase sheets ends with a suggested Outline of Announcement as follows:

As a matter of interest these new wage rates match those of the union contracts which have been submitted to the A.I.B., so you can be sure your rates will be at least equal to, if not better than the rates paid in the other plants.

There was no evidence that that announcement was not made or that what was communicated to the employees referred only to the Ottawa plant.

23. The 1979 rates were implemented on October 29, 1979 retroactive to July 30, 1979. In 1980 a non-negotiating year, the increase date was July 28, 1980. In 1983 the increase was implemented as of November 7, 1988, retroactive to July 25. The November 7, 1983 wage implementation memo says: "This schedule follows the terms of the recent union settlement in Ontario." In 1985, the increase was effective July 29, 1985. For the years not mentioned, the Board was provided with no information as to dates, other than the general statement that the increases were always retroactive to July.

24. The reasonable expectation of the Kingston employees is that the pattern of wage increases previously in place would continue. That pattern did not involve the application of an Ottawa rate determined in isolation, although employees were used to referring to it as the Ottawa rate, as the Ottawa plant was the participant in the provincial process which fell within the local management area. As described by the union's witness, Mr. Hill, the Kingston rates were the same as the rest of Ontario. This corroborates the company's evidence, as set out long before the current certification drive, in the 1978-1983, implementation memos, that the pattern of wage increases prior to the freeze involved the whole provincial picture of which Ottawa was only a part. The fact that people among both management and employees referred to this as the Ottawa rate does not determine the matter. The evidence is clear that prior to the "freeze" the Ottawa rate was the provincial rate. We do not think that the fact that there were more elements in the provincial picture, or that Ottawa's rate was no longer determined at the same time as the rest of the province detracts from the provincial nature of the rate to which they were entitled. When one asks what the *reasonable* (i.e. containing an objective component) expectations of the employees at the Kingston plant, as opposed to a subjective expectation, the evidence does not support a more precise description than the following: the Kingston employees could reasonably expect an annual increase retroactive to July which followed the provincial pattern as established by negotiations in Ontario unionized plants, to be implemented when that information was available. The evidence that there were some deviations from the provincial pattern in some classifications was uncontradicted and therefore also forms part of the pre-freeze pattern. The evidence did not support a finding that timing was crucial in the pre-freeze pattern or that the "Ottawa rate" was separable from the "provincial rate". Indeed, to sever the Ottawa rate from the provincial pattern that it was a part of before the freeze period would itself be a change to the status quo. We find that the combined "business as usual", and "reasonable expectations" test results in the conclusion that the Kingston employees are now entitled to the implementation of an adjustment to wages and/or benefits which follows the provincial pattern, the last element of which was put into place with the conclusion of the Renfrew collective agreement the week before the hearing. We do not find that the company was in breach of the "freeze provisions" set out in section 79(2) at any time up to the hearing of this matter as the final agreement in the provincial picture had not yet been signed. Failure to implement wage increases following the provincial pattern in the near future would very likely result in a different characterization of the matter.

25. Was the failure to implement the wage increase a breach of sections 64, 66 or 70? Hav-

ing considered all the evidence, we are of the view that it does not support the allegation that the statements of Mr. Rider and Mr. Maeots, nor the position taken by them in regards to the pay increase, were motivated by anti-union animus nor that the pay increase constituted intimidatory practices or punishment to the employees for pursuing certification. The linkage by Maeots of the reluctance to give the wage increase to bargaining strategy did not show anti-union animus in itself, and in all the circumstances amounts to an affirmation that the company would be bargaining with the union on these matters. It did disclose a lack of understanding of the necessity to implement the prior pattern of wage increases, but this was not established to be illegally motivated. Nor did the evidence establish interference with the representation of the employees by the trade union contrary to section 64. The evidence of declining attendance at the union meetings was entirely equivocal. It showed variable attendance long before the wage increase issue arose. The fact that some employees blamed the union for the failure to implement the wage increase, does not in the circumstances show anti-union motivation but rather appears to be a misunderstanding that could have been cleared up by explanation of the union's willingness to agree to the increases. As well, Mr. Rider's remarks could equally be interpreted as exhibiting a desire to avoid contravening the Act. (For an example of a union argument in not dissimilar circumstances that a pay increase amounted to a bribe or a device to convince employees they did not need a union, see *Scarborough Centenary* [1969] OLRB Rep. Jan. 1049). Accordingly the complaint is dismissed in regards to sections 64, 66(a) & (c) and section 70.

26. An application for certification pursuant to section 8 cannot succeed unless violation of the Act has occurred so that the true wishes of the employees are not likely to be ascertained and there is membership support adequate for certification. Having found no violation of the Act in the conduct complained of, the first condition for the application of section 8 has not been met and this aspect of the complaint is dismissed as well.

27. In summary then, we find that the employer had not breached the freeze provisions of the Act in failing to implement a salary increase up until the time of hearing, but that it is a reasonable expectation of the employees that they will receive the provincial pattern in the near future retroactive to July, 1988.

28. As the section 8 application is dismissed, the ballots cast in the representation vote which took place as previously ordered in the Board's decision of January 5, 1989 may now be counted. This matter is referred to the Registrar.

29. The complaint is dismissed.

DECISION OF BOARD MEMBER HUGH PEACOCK; May 15, 1989

1. I wish to make the following comments on the decision of the majority.

2. My colleagues do not find (paragraph 24) that the company was in breach of the "freeze" provisions set out in section 79 (2) at any time prior to the hearing of this matter as the final agreement in the provincial picture had not been signed.

3. I disagree to the extent that the employer was not, in my opinion, entitled to withhold a wage and benefit adjustment well beyond what formerly had been the time frame within which the "provincial" settlement terms had been applied to the non-unionized Kingston employees. I also disagree as to the result of the section 8 application.

4. The first question here is whether the employer's decision not to adjust Kingston employees' wages and benefits until the Renfrew settlement terms completed "the provincial" pic-

ture altered a pre-existing right protected by section 79 (2). That right was grounded in a long history of bargaining and settlements between Coca-Cola and the U.F.C.W. The majority describes this history in paragraph 13. The majority goes on to find, however, that the employees' expectations of raises tied to the Ottawa settlement were subjective in nature and therefore of less account than the objective components put in evidence by the employer which tied the adjustments to a provincial bargaining result.

5. Almost all of the evidence respecting the provincial scope of the employer's consideration of what Kingston should receive was in a form that could not likely be known to employees at that location - until the November 1988 exchange of correspondence between the union and the company. For the period prior to the onset of the freeze, there was no evidence before us that the employees ever heard the expressions "broad picture" or "provincial pattern" or that the words of the November 7, 1983 memo were read out to them. Indeed, three of the four documents were for management's eyes only being headed in capital letters "*Private & Confidential*" or "*Strictly Private & Confidential*" (Exhibit 4b). However, to quote from the *Forintek* decision, *supra*, "The elements of the prior pattern are ascertained *from the perspective of employees...*" (my emphasis). Also in *Le Patro d'Ottawa* [1983] OLRB Rep. Feb. 244, at paragraph 5, the knowledge of employees, the Board has held, must be taken into account:

The Board has consistently required that a firm decision to substantially change terms and conditions of employment or the privileges of employees must be communicated to the employees prior to the onset of the freeze period. (*Carleton University*, [1978] OLRB Rep. Feb. 184; *Lennox & Addington Hospital*, [1978] OLRB Rep. Sept. 843; *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461.) *The Board recognizes that for the freeze period to operate effectively it must be in relation to rights and privileges which are known to both the employer and the employees.* As the Board noted in the *Carleton University* case, a decision taken before the freeze but known only to the employer could be revoked or altered during the freeze, prior to any communication to the employees, so that neither the employees nor their union, nor for that matter the Board, could effectively enforce the freeze provisions with any certainty. For that reason, in the interest of preserving stability in the employment relationship during the freeze period *the Board has interpreted the freeze as applying to the rights and privileges of all parties as they were known to them at the time of the notice triggering the freeze.*

[my emphasis]

6. This is not to say the employees' view must prevail. On the other hand, the employee-witnesses could not be held to be mistaken about the past pattern of adjustments to terms and conditions of employment. David Balfour testified that throughout his more than 13 years employment the increases he received were "tied to the Ottawa plant. Whatever they got, we got". Mr. George Kincaid testified that the event that triggered the Kingston raises was the signing of the Ottawa contract. "We got exactly what they got", he said. He added that he had read the Ottawa contract 2 or 3 times "because we weren't always sure of what we were getting". Mr. Brian Seymour also referred to the Ottawa relationship in his evidence. Clearly there was a course of conduct on the part of the employer giving form to a perception on which employees based their expectations.

7. If it knew of the Kingston employees' misperception, there is no evidence that the employer ever corrected the impression that the Ottawa rate was really a "provincial" rate, that what the Kingston employees were receiving was the result of a pattern, generally speaking, tied not to the Ottawa settlement but to the broader provincial settlement. The closest we came to a disclosure of the employer's past wage policy for Kingston is the following statement in Mr. Maeot's letter:

As you may know, over the years the company has generally attempted to maintain comparable

wage rates between unionized and non-unionized locations in near proximity. Such attempts, however, have not amounted to a commitment from the employer or a condition of employment.

8. The phrase "locations in near proximity", given Mr. Maeot's direct evidence, clearly points to Ottawa. There is no mention in the letter of the Company's 1987 acquisitions programme or the pending negotiations at Renfrew. Other than Mr. Maeot's evidence given at the hearing, nothing shows why the employer had felt it necessary to wait until the result of the Renfrew negotiations was known before deciding how to apply the completed provincial settlement terms to Kingston. The Board did not hear why the result of bargaining in Renfrew was of such weight that it would affect the determination not just of the timing, but of the degree to which Kingston employees would share in the Ottawa or Renfrew or province-wide settlement terms. At the hearing, Mr. Maeots testified that "once we concluded Ottawa in October and faced expirations at Uxbridge and Renfrew, then the question became, What should the Kingston rates be?". We do not know the date that question first arose. When asked, "At what point in time could you first put your mind to the Kingston increases", Mr. Maeots replied, "Last week when I was first advised of the Renfrew settlement". It is obvious, nevertheless, that a prior decision had been taken not to apply the increases of the Ottawa settlement of October 13, 1988 to Kingston employees. That decision, if it was known in September, was not conveyed by Mr. Rider; he offered another reason to which I shall return for not passing on the Ottawa increases.

9. The Board is called on to weigh the evidence brought by the employer as to its pre-freeze wage policy as against the employees' evidence of their perception of the employer's conduct. In a pre-bargaining relationship governed by section 79, it is not open to the employer to justify the alteration of a long-established method of wage adjustments by pointing to a new business factor (Renfrew) in front of the Board, having withheld that rationale from employees. The wait for the Renfrew result is not like the delayed Kingston increase of 1978 pending A.I.B. approval. Then, all locations were subject to A.I.B. approval and delay of implementation pending that approval. The Board has refined the analysis of the "freeze" provisions of the Act to encompass "the reasonable expectations" test (*Simpsons Limited, supra*). It follows that the importance of the employees' perspective must be given greater weight as against the employer's reasons for the change, especially when those reasons were never communicated to the employees or to the trade union in advance of the freeze.

10. I find on the evidence that:

- a) there was a well-entrenched method of adjusting wages and benefits of Kingston employees;
- b) the business-as-usual practice was to adjust Kingston terms and conditions in accordance with the Ottawa settlement and from the perspective of employees they had a reasonable and objective expectation that the October, 1988 Ottawa terms of settlement would be applied to them, as before;
- c) the employer's suspension of an adjustment for Kingston pending the outcome of Renfrew negotiations was not part of the pattern prior to the onset of the freeze in November or December, 1987; and
- d) if it was, the employer's policy was not communicated to Kingston employees prior to the onset of the freeze so as to bring an end to their reliance on what they perceived to be the traditional pattern.

11. I must go on to find that the employer breached the provisions of section 66 and 70 by its behaviour over the freeze issue. Rather than conveying a clear rationale to its employees about its view of the freeze provision, it instead in effect signaled employees that the cost of sorting out the unionization issue would be a delay of wage increases well beyond the normal time frame. It is hard to credit that the company only put its mind to the Kingston adjustment after the Ottawa settlement had been reached in mid-October. Mr. Rider's "bribery" rationale for withholding increases was delivered in mid-September. It is unlikely that he was indicating a negative response without authority from at least the regional management in Ottawa.

12. The result for the trade union was a sharp falling off of participation in its activity, as measured by the turn-out at the meetings described by Mr. Hill. With the passing of time and the chilling effect of the employer's withholding of anticipated wage increases, the interest of employees in collective bargaining, I accept, was severely damaged. The application for certification was filed in November, 1987 or 15 months prior to the date of hearing into these issues. The adage, labour relations delayed are labour relations denied, derives from circumstances such as these. Acknowledging that it took some months to sort out other matters associated with the certification prior to the October, 1988 settlements, I do not view the passing of time in isolation. Delay, however caused, always favours the employer's interest. Section 8 decision-making should not encompass only the worst manifestations of employer retaliation against employees for the exercise of their rights such as dismissals. Denial of an anticipated wage increase is a powerful reminder of the employer's capacity to retaliate and I regard such action in the context of this case as having an adverse effect on employees' ability to express their true wishes through the secrecy of the ballot box. It is well known that demoralization deters voters from making an informed choice and often deters them from going to the polls at all. In a workplace setting, the result sought by the employer is achieved by disillusioned employees voting against the union.

13. I find that the employer's alteration of the terms and conditions of employment was in contravention of sections 66 and 70. Section 8 should be invoked to certify the applicant because the true wishes of employees are not likely to be ascertained by a vote. The trade union, which filed evidence of membership on behalf of not less than 45 per cent of the employees of the respondent, (per the Board's decision of January 5, 1989) clearly has membership support adequate for the purposes of collective bargaining.

1108-88-U Sheet Metal Workers' International Association, Local 47, Complainant, v. Conrad Heating Co. and Joe Conrad, Respondents

Practice and Procedure - Remedies - Union notifying Board that its remedial order had not been complied with and requesting that Board file the order in court - Board reviewing its procedures for dealing with allegations of non-compliance - Act not requiring a hearing where the fact of non-compliance is not put in issue - Order filed in court

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. H. Wightman* and *K. Davies*.

DECISION OF THE BOARD; May 9, 1989

I

1. This is a complaint under section 89 of the *Labour Relations Act* which was heard together with a related application under section 124. The Board (differently constituted) determined that the respondent employer contravened the *Labour Relations Act* and directed as follows:

As a result of our findings above and pursuant to section 89, we direct that the respondents pay to the complainant/applicant on its own behalf and in trust for Mr. Hamelin the sum of \$1,983.52 together with interest to date in the amount of \$65.46 on or before December 31, 1988.

The Board's decision was released on December 1, 1988.

2. By letter dated April 5, 1989 counsel for the complainant union wrote to the Board as follows:

On December 1, 1988, a panel of the Ontario Labour Relations Board consisting of Judith McCormack, Vice-Chairman, and Board members G. O. Shamanski and B. L. Armstrong rendered a decision on Board Files No. 1108-88-U and No. 1242-88-G.

With regard to the Section 89 complaint set out in Board File No. 1108-88-U, the Board ordered that the Respondents Conrad Heating Co. and Joe Conrad pay to the Complainant, Sheet Metal Workers' International Association, Local 47 on its own behalf and in trust for Mr. Hamelin the sum of \$1,983.52 together with interest to date in the amount of \$65.46 on or before December 31, 1988.

To date, the Complainant has not received any monies pursuant to the Board Order as summarized above. Accordingly, pursuant to Section 89(6) of the *Labour Relations Act*, this letter will serve to notify the Board of the Respondents' failure.

Please find enclosed a completed Form 3. I trust that, pursuant to Section 89(6) of the Act, the Board will take steps to file the enclosed Form, in the Office of the Registrar of the Supreme Court.

I thank you in advance for your co-operation in attending to this matter.

Upon receipt of the complainant's letter and request that the Board Order be filed in Court for the purpose of enforcement, the Board's Registrar wrote to the respondents as follows:

The Board is in receipt of the attached letter dated April 5, 1989, from counsel for the complainant, which alleges that the respondents have failed to comply with the terms of the decision of the Board dated December 1, 1988, directing the respondents to implement the settlement therein set out.

If the respondents have any representations to make with respect to the said submission of counsel for the trade union, you must file them with the Board not later than April 24, 1989.

If you fail to file any submission on or before that date, or if the Board is satisfied on the submission made to it that there has been non-compliance with the said Board order, the Board will file the said order in the Supreme Court pursuant to Section 89(6) of the *Labour Relations Act*.

3. As of the date hereof there has been no response from the respondents to either letter or the submissions contained in them. The respondents have not contested the fact that there has been a failure to pay the monies specified in the Board's decision.

II

4. Section 89(6) of the *Labour Relations Act* provides:

Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

5. Although [what is now] section 89(6) could be read as requiring the Board to file its determination with the Registrar of the Supreme Court upon merely being "notified" of non-compliance, for a number of years the Board considered it appropriate to require a party requesting that the Order be filed to prove the fact of non-compliance if such was disputed. This practice was consistent with the then current view that practical or labour relations difficulties arising from the Board determination should be addressed, initially, by the Board before seeking the intervention and involvement of the Courts. This procedure received the approval of the Court in *Chairtex Manufacturing* (1971) 3 O.R. 154 where the Court held that the Board did not exceed its jurisdiction by adopting this approach. More recently, however, the Board has introduced a procedure whereby it advises the respondent of the allegation of non-compliance, and gives the respondent an opportunity to take issue with that submission (see for example *Apple Bee Shirts Limited*, [1983] OLRB Rep. Dec. 1957). Where the respondent either agrees that there has been a failure to comply with the Board's determination or simply does not respond to the allegation of non-compliance, the Board will typically file its determination with the Court pursuant to section 89(6) of the Act, because, in the absence of any response, it will normally be satisfied that there has been a failure to comply. Neither *Chairtex* nor the terms of the statute *require a hearing*, and none is really necessary where the fact of non-compliance is not put in issue.

III

6. Having regard to the foregoing, the Board is satisfied that the respondents have failed to comply with the Order of the Board and directs that that Order be filed in the Supreme Court of Ontario so that the complainant can seek its enforcement.

1532-88-R Service Employees International Union Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., Applicant v. Estonian Relief Committee in Canada, Respondent v. Group of Employees, Objectors

Certification - Evidence - Membership Evidence - Nature of inquiries made by Form 9 Declarant were such that the Form 9 was unsatisfactory - Declaration cannot be based on the assumption that a collector has carried out prior instructions or on an examination of the membership cards - Recall of collector as witness to establish that each applicant for membership had personally paid a dollar not permitted - Application dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *M. Rozenberg* and *D. A. Patterson*.

APPEARANCES: *Kathleen Martin* for the applicant; *D. B. Francis*, *A. Kuuskne* and *A. Niitenberg* for the respondent; *Judith Christoforou* in person.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER M. ROZENBERG;
May 12, 1989

1. By decision dated November 15, 1988 (reported at [1988] OLRB Rep. Nov. 1167), the Board directed that this application for certification be listed for hearing for the purpose, among others, of inquiring into an allegation with respect to certain membership evidence filed by the applicant. At the conclusion of a hearing before us on December 7, 1988, the majority of the panel (Board Member Patterson dissenting) delivered the following decision:

1. This is an application for certification.

2. The inquiry referred to in paragraph 19 of our decision of November 15, 1988, was conducted on December 7, 1988. We concluded that although there was no particular cause for concern either about the transaction identified there or the activities of the collector, the nature of the inquiries made by the Form 9 declarant was such that the Form 9 Declaration itself was unsatisfactory. Accordingly, there was not satisfactory evidence before us that any employee of the respondent was a member of the applicant at any relevant time and, therefore, we ruled orally (Board Member Patterson dissenting) that this application, including the claim for certification under section 8, was dismissed. This dismissal was and is without prejudice to the filing of any application supported by a fresh, accurate Form 9 declaration.

3. Our reasons for this decision will be given in writing in due course if a written request for such reasons is delivered to the Registrar within fourteen days.

Counsel for the respondent has asked that we deliver reasons in writing for this decision.

2. The allegation which led to our inquiry was described in paragraphs 18 and 19 of the panel's decision of November 15, 1988. The evidence we heard from Ms. Ender (the applicant for membership) and Ms. Kokko (the collector) was that when Ms. Ender signed the application for membership offered to her by Ms. Kokko she had only a \$20.00 bill with which to make the requisite \$1.00 payment. Ms. Kokko was unable to make change. They were both on the way to a meeting between union representatives and bargaining unit employees. Ms. Kokko suggested that Ms. Ender might speak to someone she knew in the bargaining unit with respect to her need for

change. Once in the meeting, Ms. Ender spoke to a fellow employee she knew and asked to borrow a dollar. The friend loaned her the dollar. She then took the dollar and the signed card to Ms. Kokko. Ms. Kokko did not see the transaction between Ms. Ender and her friend, nor did she ask Ms. Ender where she had got the dollar. Ms. Ender repaid her friend when she next saw her. This evidence did not cast any doubt on the application for membership in question, nor on the activities of the collector in connection with it. The absence in the Form 9 Declaration of any reference to this transaction was not a concern when, as here, the collector had no knowledge that the dollar tendered by the applicant for membership had been obtained from someone else. (That is not to suggest that we would necessarily have been more concerned had the collector been an eye-witness to the transaction between Ms. Ender and her friend. That is not the situation with which we had to deal.)

3. When the Board undertakes an inquiry with respect to membership evidence, it summons both the collector of the evidence and the Form 9 declarant so that it can discover what communication there was between the collector and the Form 9 declarant with respect to the membership evidence which is the subject of the inquiry. In this case, Ms. Kokko testified that the only question she was asked by the Form 9 declarant when she handed over to him Ms. Ender's card and dollar was whether *she* had lent the dollar to Ms. Ender. She could not remember being asked any other question. The Form 9 declarant testified that when he received Ms. Ender's card and dollar from Ms. Kokko, he asked her two questions: whether she had lent the person the dollar and whether she had forced the person to sign. He received a negative answer to both questions. He checked the card to see that signatures appeared in the proper places on it.

4. The Board drew the Form 9 declarant's attention to the language of paragraph 3 of the Declaration he had signed, which reads:

(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment an account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, **EXCEPT IN THE FOLLOWING INSTANCES:**

The Form 9 declarant was asked how his having asked just those two questions would have put him in a position to make the statement contained in paragraph 3. He replied that from the fact that Ms. Kokko had not lent the applicant the dollar he *assumed* that the applicant had paid her own dollar to Ms. Kokko. He volunteered that the two questions he asked of Ms. Kokko with respect to Ms. Enders' card were the only two questions he ordinarily asked in an organizing campaign and were the only two questions he had asked with respect to any of the cards submitted by the union in connection with this application.

5. Ms. Kokko was shown as collector on all of the cards submitted in connection with this application. Before Ms. Kokko began collecting cards, the Form 9 declarant instructed her with respect to the steps to take. These instructions were confirmed on a written form which she was required to sign. The form read as follows:

INSTRUCTIONS TO COLLECTOR

1. Collect \$1.00 from *each person* who signs our card.
2. *Do not lend any person any money. The dollar must be paid for by the applicant only.*

3. If the *applicant does not have a dollar* when approached *do not* allow applicant to sign card. Wait until the applicant has the dollar for payment before allowing card to be signed.
4. The *applicant must sign in both places* where you see **SIGN HERE**
5. Witnesses (as the Actual Recipient) by the persons signature at the time of *signing by the person*.
6. See that the *date of signing is* the date the card *is signed*.
7. On the back of the card please *print all information* required, including Apartment No. or Unit No.
8. The *Receipt* must be completed by the *Receiver* and *dated the same* as the *date of applicants signature* and the receipt then given to the applicant.

I have read the above instruction and undertake to carry them out to the best of my ability.

Signed:

Witnessed:

Date:

All but two of the cards submitted with this application were handed to the Form 9 declarant on September 25, 1988. On this occasion, the Form 9 declarant asked Ms. Kokko whether she lent anyone the dollars. She answered "No, those are the original dollars." The Form 9 declarant asked if she had forced the applicants to sign or had any problems or questions that she needed answered. She said no. He asked no other questions. During his testimony before us, counsel for the union asked the Form 9 declarant several times whether he had made inquiries as to who had paid the dollars which accompanied the cards. He said he had not.

6. The problem this evidence created was quite simple: how could Ms. Kokko's statements that *she* did not lend the dollars or force anyone to sign a card amount to information that each applicant for membership had *personally* paid a dollar *directly* to Ms. Kokko, which is what the Form 9 declarant represented he knew as a result of personal knowledge and inquiries?

7. At the conclusion of the testimony of the Form 9 declarant, counsel for the union sought to recall the collector as a witness to establish that the persons whose names appeared on the cards had personally made the \$1.00 payments referred to in the cards and that the payments had been made directly to her as collector. The relevance of the proposed evidence was questioned.

8. In *Pebrs Peterborough Inc.*, [1988] OLRB Rep. Jan. 76 the Board reviewed the function of the Form 9 Declaration, noting that the membership evidence to which it relates will not be given any weight where a Form 9 is not filed or, having been filed, is found not to be proper in the sense that inquiries were not made or exceptions or matters that should have been noted were not noted or inaccurately noted. A question arose in that case about whether inadequacies in the Form 9 Declaration or the inquiries made by the Form 9 declarant could be cured by introducing evidence before the Board with respect to the matters which ought to have been the subject of the Form 9 declarant's inquiry. The Board concluded that it could not, and made these observations in that connection:

44. Quite apart from the fact that Rule 6 requires such a Form 9 to be filed, fairness to the parties and the integrity of the process demands such a Board response when a proper Form 9 is not

filed. It is not a question of punishing the transgressing party, but of ensuring that both the Board and the parties have confidence in the integrity and fairness of the system and the certification process. Any such confidence would be seriously undermined if the Board were to conclude that a Form 9 was improper in one of the respects noted above, but nevertheless were to rely upon the *viva voce* evidence to find that the membership evidence was adequate and reliable. Were the Board to do so, there would be little incentive for Form 9 declarants to file proper Form 9's or make the necessary inquiries, since at worst an intentionally misleading or negligently inaccurate Form 9 would lead to the Board conducting its own inquiry, and at best, the Board might never discover the problems with the membership evidence. The requirement under the Rules that a Form 9 be filed, and the Board's insistence that it be a proper Form 9, provides the necessary deterrent to such potential abuse.

The issue which had arisen before us was whether the Form 9 declarant in this case made the inquiries which paragraph 3 of each of his Declarations represented he had made before signing those Declarations. The evidence which union counsel wished to adduce by recalling the collector would not have addressed that issue. It appeared to the panel that the passage we have quoted from *Pebrá Peterborough Inc.*, *infra*, answers the proposition that such evidence should be received in order to assess whether any failure to make appropriate inquiries was of serious consequence in the circumstances of this case. It is always of serious consequence when a Form 9 declarant fails to make the inquiries contemplated by paragraph 3 of the declaration, whatever might have been the result if such inquiries had been made. This panel ruled unanimously that the evidence union counsel wished to introduce was not relevant and would not be received.

9. The union official who signs a Form 9 Declaration thereby represents to the Board that he or she has personal knowledge or has made appropriate inquiries with respect to the matters referred to in paragraph 3 of Form 9. As the Board observed in *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738 at paragraph 13:

It is readily apparent that a person completing Form 9 must be seized with some type of knowledge in order to satisfy the requirements of item 3 cited above. This knowledge may be personal knowledge (i.e.) knowledge gained by either acting as the actual collector or knowledge gained by being personally present and actually witnessing the transaction between the collector and the member wherein the membership card was signed and payment of money made by the member to the collector.

The other type of knowledge which is acceptable is that knowledge gained from inquiries made of the persons who actually acted as collectors, or the persons who made the necessary inquiries of the actual collectors.

The requirement that inquiries be made is obviously not an onerous one or one that imposes an undue burden on the applicant; however, the requirement is that inquiries be made. *In order that inquiries be meaningful it is obvious that they must be made after the event. Instruction given to collectors prior to the signing of members may be helpful or necessary in the carrying out of an organizing campaign, however, such instructions do not obviate the necessity of making the inquiries required for the proper completion of Form 9.* (See *Dominion Stores Limited* case, [1964] OLRB Rep. Dec. 447).

In the instant case, Mr. Storey, prior to completing Form 9 made inquiries of Mr. Cooke. However, Mr. Cooke had made no inquiries of Mr. Griffin and in turn Mr. Griffin had made no inquiries of other persons who had acted as collectors. It is readily apparent that the inquiries made by Mr. Storey were made of a person who had no direct knowledge of the collectors and the failure of Mr. Cooke and Mr. Griffin to make inquiries frustrated the purpose of Mr. Storey's inquiries. Where the officers of an applicant trade union have themselves frustrated the inquiries made by the person who completes Form 9 and by their failure to follow through with their own inquiries, render the inquiries made by such persons meaningless, we must find that Form 9 in such circumstances cannot serve the purpose for which it was intended and in such circumstances is a nullity. In arising at this conclusion, the Board has noted with approval the

Valley Transportation Company Limited case, [1963] OLRB Rep. Nov. 448, wherein the Board said at p. 452:

The Board must expect and insist that persons who file applications for membership cards and receipts and Form 9 as evidence of membership, take all necessary precautions and care to ensure that the information contained therein is true and accurate. The Board is entitled to demand the highest standards of integrity, disclosure, and accuracy on the part of those who submit such evidence and where undisclosed inaccuracies of material facts are later brought to its attention, to take a strict view of them.

[emphasis added]

In *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656, the Board observed that:

The standard enunciated by the Board in *National Steel Car*, *supra*, has been consistently applied in other cases in which the same issue arose. It is a standard which is well known in the labour relations community, and the cases on point are legion (see for example: *Puretex Limited*, [1972] OLRB Rep. June 676 and cases cited therein; *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181; and *N. D. Supermarket Limited*, [1976] OLRB Rep. March 112; *Triad Triumph Limited*, [1976] OLRB Rep. March 115; *Country Village*, [1976] OLRB Rep. July 373; *The Alexandra Hotel Limited*, [1972] OLRB Rep. Nov. 963; and more recently *Trent Valley Lodge Limited*, [1980] OLRB Rep. June 926). The purpose of the Form 8 [now Form 9] inquiry (and the 'second check' that it builds into the system) is equally clear. The Board must place total reliance on documentary evidence--written hearsay, often solicited by inexperienced laymen, yet not revealed to the employer or subject to cross-examination (see section 100 of the Act). On the basis of that evidence, a trade union may be certified as the employees' bargaining agent without recourse to a representation vote. Indeed, unless some specific irregularity is brought to the Board's attention, the Board will normally place total reliance on the Form 8 Declaration and will not undertake any formal inquiry concerning membership documents which appear to be regular on their face. In the present case, for example, the Form 8 problem would never have come to light had it not been for the disclosure of an irregularity which would not have been apparent on the face of either the Form 8 Declaration or the membership card itself. To avoid such problems, the Board has always held that the person signing the Form 8 must be meticulous and comply strictly with its requirements.

10. With respect to each piece of membership evidence which consists in part of receipts or other acknowledgements of payment, a Form 9 declarant must be able to declare that the persons whose names appear on the cards as collectors are the persons who actually collected the money referred to in them and that each applicant for membership personally paid the amount shown on the card to that collector. It is not enough for a Form 9 declarant to base this Declaration on an assumption that collectors have carried out instructions given to them before they collected the cards in question. It is not enough to base the Declaration on an examination of the cards; the object of the Form 9 Declaration is to corroborate the contents of the cards. The nature of the inquiries necessary in any particular case will depend on the circumstances, but there is a minimum content to the inquiries the Form 9 declarant must make when he or she does not have personal knowledge of the circumstances in which the membership evidence to be submitted with it was obtained. It is necessary for the Form 9 declarant to ask, in some way or other, whether the applicants for membership named on the cards personally paid the dollars submitted with their applications for membership and whether the persons named as collectors on those cards are the persons who collected those dollars directly from the applicants. These questions must be asked either of someone who would have personal knowledge of the answers or of someone who has himself or herself made appropriate inquiries. The ultimate source of information obtained by inquiry must in each case be someone who would have personal knowledge of the matters inquired about.

11. The issue here was not whether the Form 9 declarant honestly believed that the applicants for membership all personally paid to Ms. Kokko the amounts shown on their cards, nor is it

whether he made some enquiries about the circumstances in which cards were obtained. The issue is whether he had personal knowledge or made enquiries about the matters addressed by paragraph 3 of the Form 9 Declaration he signed. The exchange between the Form 9 declarant and the collector in this case did not address the relevant questions. The implicit representation in his declaration that he had made inquiries with respect to those matters was inaccurate. As a result, we could not be satisfied that any of the documentary evidence submitted with those Declarations was reliable evidence that the persons referred to in it were members of the applicant. In the absence of any reliable evidence that any person in the bargaining unit was a member of the applicant on the relevant date, the application failed insofar as it was an application under section 7. As there was no reliable documentary evidence of membership support referable to any point in time, the application also failed insofar as it was an application under section 8.

DECISION OF BOARD MEMBER D. A. PATTERSON; May 12, 1989

1. I dissent from the majority decision of the Board. I would not have found the applicant's Form 9 to be faulty.

2. The evidence is that the Form 9 declarant filed two Form 9's, one was signed for 19 employees and the second Form 9 was signed for 2 employees. The second Form 9 involved the allegations by the representative for the group of objecting employees of non-pay against the collector for the applicant.

3. The Form 9 declarant, an organizer for the applicant, for a number of years has developed an information sheet containing do's and don'ts for those employees assisting him in organizing campaigns. The form is laid out in paragraph 5 of the majority decision. At the bottom of the form there is space for signatures and dates for those persons involved in a campaign by the applicant. The collector, Ms. Kokko was given this information sheet by the Form 9 Declarant, who went over the sheet with her before she signed and dated it. Mrs. Kokko also gave evidence that the Form 9 declarant had stressed the importance of diligence on her behalf during the organizing campaign citing an example of a certificate of representation of a union was revoked because the union involved had erred in its evidence during the certification application.

4. Ms. Kokko was asked by the Form 9 declarant if she had lent anyone \$1.00, to which her evidence was "those are the original \$1.00's". He also asked the collector if she had forced anyone to sign a card to which she replied "no". I believe the collector was aware of her responsibilities as organizer and collector for the applicant union, she was counselled before the actual campaign started by the Form 9 declarant and was aware of the consequences of doing something wrong during the campaign. The collector testified this was the first time she was ever involved in an organizing campaign for a union. I believe she acted in a conscientious manner and her conduct was of a cautious nature during the campaign. The Form 9 declarant was given no reason to doubt the collector's statements about moneys collected and cards signed and witnessed by her. To the best of his knowledge, of the enquiries he made, he was satisfied that the persons who made application to the union paid their own \$1.00 and were receipted properly by the collector for the \$1.00 received.

5. This case is distinguishable from *Pebrá Peterborough Inc.*, [1988] OLRB Rep. Jan. 76, at paragraph's 22 and 23:

22. The instant application was received by the Board on February 18th, and was followed shortly thereafter by a Form 9, again signed by McLean as President of the applicant, which again disclosed no special circumstances or exceptions. With respect to this Form 9, and McLean's personal knowledge of the circumstances of the collec-

tion of cards, McLean testified that he had had very little to do with the collection of cards, or the re-signing of the membership cards, as only Hamilton and Rutherford had collected them. He also testified that he could not answer whether the person who had signed as collector on the second re-signed cards, for which no additional dollar was paid, had signed the original card as collector. McLean in effect admitted in testimony that when he signed this Form 9 he was unaware of whether the person signing as collector had actually collected the dollar with respect to the applicable card. McLean also testified, with respect to cards signed by first time members and accompanied by a dollar payment, that he had personal knowledge of the signing of only one of those new cards. He had no personal knowledge of the collection of the other new cards. He did not compare the cards with the receipt books before signing the Form 9. He also stated that he had not asked the two collectors, prior to signing this Form 9, whether each of them had collected the dollar for the cards which they had signed as collector.

23. Rutherford in turn testified that she had no discussions with McLean whatsoever with respect to either the first Form 9 filed in this proceeding, or as will be seen shortly, the subsequently filed amended Form 9. Rutherford testified that neither McLean, nor Hamilton (to whom Rutherford had given her cards), had asked her any questions about the collection of cards that Rutherford had signed as collector.

In *Pebra*, supra, the Form 9 declarant gave evidence to the Board he had made no enquiries whatsoever of the 2 collectors. This was corroborated by Ms. Rutherford, one of the collectors.

6. The Board is not dealing with a situation where the Form 9 declarant did not make enquiries, or that the \$1.00 was not paid or receipts given by the collectors. The Board is faced with determining whether enquiries made by the Form 9 declarant were sufficient enough to satisfy the Board that the applicant's Form 9 was signed after sufficient enquiries were made of the collectors and the Board was satisfied of the enquiries made. The majority of the Board is not satisfied, I am.

7. I would have found the declarant's Form 9 proper and allowed the membership evidence and issued a certificate to the applicant.

0824-88-JD United Brotherhood of Carpenters and Joiners of America, Local 2041, Complainant v. Ferano Construction Limited; Labourers International Union of North America, Local 527; and Labourers International Union of North America, Ontario Provincial District Council, Respondents

Jurisdictional Dispute - Parties - Settlement - Constituent of Carpenters' Employers' Bargaining Agency not entitled to be a party to the jurisdictional dispute - Whether an oral settlement of the complaint had been reached - Board finding that counter-offer made which nullified the offer of settlement - No longer any offer on the table for acceptance - No settlement - Hearings to continue

BEFORE: R. A. Furness, Vice-Chair, and Board Members J. Redshaw and D. A. MacDonald.

APPEARANCES: Denis Power and Donald Guilbeault for the complainant; George Rontiris and D. Ferrarotto for Ferano Construction Limited; Stephen B. D. Wahl, B. Carrozzi and A. Roy for the other respondents.

DECISION OF THE BOARD; May 1, 1989

1. This is a complaint under section 91 of the *Labour Relations Act* in which the complainant is seeking a direction with respect to the assignment of certain work. This complaint arose out of a referral to arbitration pursuant to the provisions of section 124 of the *Labour Relations Act* (see Board File 0095-88-G). The referral was filed by the Labourers International Union of North America, Local 527 ("Local 527") against Ferano Construction Limited ("Ferano"). The United Brotherhood of Carpenters and Joiners of America, Local 2041 ("Local 2041") filed an intervention in the referral under section 124.

2. In the instant complaint Local 527 and the Labourers International Union of North America Ontario Provincial District Council (the "District Council") had not initially been named as respondents. Local 527 and the District Council requested that they be named as respondents. Neither the complainant nor Ferano objected to this request. Having regard to the representations before it, the Board directs and Local 527 and the District Council are hereby added as respondents in this complaint.

3. Local 527 and the District Council objected to the claim by the Acoustical Association of Ontario (the "AAO") to be a party in this complaint. Ferano is a member of the AAO. In an employer bargaining agency designation dated April 10, 1980, the AAO is a part of the United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency. In addition, the AAO is a party to a special appendix of the provincial collective agreement. After entertaining the evidence and representations of the parties the Board made the following oral decision on January 27, 1989:

- I The Acoustical Association of Ontario (the "AAO") seeks to be a party to this complaint under section 91 of the *Labour Relations Act*. The position of the AAO is supported by the complainant and the respondent Ferano Construction Limited and is opposed by the Labourers' International Union of North America, Local 527, and the Labourers International Union of North America, Ontario Provincial District Council.
- II The AAO was not initially named as a party to this complaint. However, the request to be added as a party to a complaint under section 91 is not dependent upon being named as a party by a complainant.
- III The AAO rests its claim to be added as a party upon the fact that it has the authority under the constitution of the Carpenters' Employers' Bargaining Agency to negotiate an appendix to the provincial collective agreement subject to the conditions set forth in article 6.03 of the constitution of The Carpenters' Employers' Bargaining Agency. Article 6.03 of that constitution provides as follows:

A master agreement shall be negotiated by the Agency containing general terms and conditions pertaining to the employment of employees represented by the Union. Each employer group(s) as hereinbefore set forth shall, if it so desires, negotiate an appendix with the appropriate employee council/committee which appendix shall contain the specific terms and conditions pertaining to its specific trade (branch of the trade). Any employer group may have representation at any of the negotiations of any other employer group but each employer group/member shall make the final and absolute determination of its own appendix. Provided, however, that prior

to the finalization of the appendix same shall be submitted for review to the Agency at a meeting of all the members called as provided for in Paragraph 6.01.

The AAO also relies upon a distinction which it says exists between the carpenters and carpenters' apprentices who are covered by the acoustic and drywall appendix and other carpenters and carpenters' apprentices who are covered by the white pages of the provincial collective agreement.

IV The Board has considered the evidence and representations which were made before it. The AAO is bound by the provisions of the provincial collective agreement. However, the AAO is not the sole party to the provincial collective agreement. The AAO is merely a constituent of the Carpenters' Employers' Bargaining Agency.

V The grounds advanced by the AAO do not in our opinion establish an entitlement to be a party under the provisions of section 5 of the *Statutory Powers Procedure Act*. The AAO is neither specified as a party nor under the *Labour Relations Act* nor a person entitled by law to be a party. In our opinion, the AAO has not established that it has an interest which would entitle it to be added as a party. The assertion that there are different provisions which apply to various employees who are covered by the provincial collective agreement does not in itself entitle the AAO to be a party to this complaint.

4. The Board heard extensive evidence regarding whether there had been a settlement of this complaint under section 91 of the *Labour Relations Act*. Such a settlement, if it occurred, was in the nature of an oral settlement as opposed to a formal written settlement. It was the position of Local 527 and the District Council that a settlement of the complaint or at least a trade settlement had been reached between the two trade unions. Local 2041 and Ferano adopted the position that no such settlement had been reached.

5. There is, of course, no requirement that a settlement be in writing or signed by the parties. See *Ontario Hydro*, [1983] OLRB Rep. Nov. 1869 and *Perfection Rug Co. Ltd.*, [1984] OLRB Rep. Jan. 68. The existence of a settlement is a matter of proof. See, for example, *Suss Woodcraft Ltd.*, [1983] OLRB Rep. Apr. 600.

6. It was the position of Local 527 and the District Council that an offer made by Local 2041 had been accepted by Local 527 thereby resulting in a settlement. It was the position of Local 2041 that an admitted written offer dated November 30, 1988 was indeed intended as such but was a conditional offer subject to a condition precedent, that is to say, conditional upon the approval by a group of employers engaged in the installation of drywall and acoustic material known as the Walls and Ceilings Contractors Association ("WACCA") and that it was irrelevant that WACCA is not a party to this complaint. In the alternative, it was the position of Local 2041 that the offer of November 30, 1988 was countered by an offer by Local 527 and that a counter-offer was a rejection of the original offer and therefore nullified the original offer. In the further alternative, it was the position of Local 2041 that the offer of November 30, 1988 was withdrawn before the attempted acceptance and having been withdrawn it was no longer open for acceptance. Local 527 and the District Council were of the view that the approval of WACCA was never agreed upon as a condition precedent by Local 527 and Local 2041.

7. If the condition is a true condition precedent, there is no contract or settlement until it is satisfied. In *Turney v. Zhilka*, [1959] S.C.R. 578, the Supreme Court of Canada defined that expression as follows at pages 583 to 584:

The obligations under the contraction, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party--the Village council. This is a true condition precedent--an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side.

In *Dickinson v. Dodds* (1876), 2 Ch. D. 463 the English Court of Appeal held that an offer may be withdrawn before acceptance without any formal notice to the person to whom the offer was made. It was further held that it is sufficient that that person has actual knowledge that the party who made the offer has done some act inconsistent with the continuation of the offer. Such principles have been applied in Canada. See, for example, *The Provincial Sanatorium v. McArthur* (1935) 10 M.P.R. 199. And see also *McMaster University v. Wilchar Construction Ltd. et al* [1971] 3 O.R. 801 where Thompson, J., stated at page 816:

"It is unnecessary that the withdrawal of an offer in any case be by formal document. Withdrawal is effective if the offeree knows from any source that the offeror no longer intends to contract with him; and this latter fact may be inferred from the conduct of the offeror: see *Dickinson v. Dodds* (1876), 2 Ch. D. 463; *Cartwright v. Hoogstoel* (1911), 105 L.T. 628."

8. The Board heard testimony from Bernardo Carrozzi, the Business Manager and Secretary-Treasurer of Local 527; Andre Roy, a Business Representative and Assistant Business Manager of Local 527; Donald Guilbeault, the Business Manager and Financial Secretary of Local 2041; Richard Lecompte, the Business Representative of Local 2041; Donald Sutherland, one of the owners of Murphy and Morrow Limited which is in the business of drywall and acoustics; Daniel Greco, the Operations Manager of the Ontario Construction Association; Domenic Ferrarotto, President of Ferano; Jack Donovan, the President of Donovan & Lebeau Limited and Everett Colton, the President of Duron Ottawa Limited. The Board has considered the evidence of these witnesses' testimony together with the written evidence which was adduced before the Board.

9. One of the central matters in the evidence before the Board was the diary of Mr. Guilbeault. There are various constructions which may be made with respect to the contents of this diary. It was the view of Local 527 and the District Council that there had been subsequent deletions and additions to the diary in order to support the contention of Local 2041 that there had not been a settlement. Various interpretations are possible with respect to this diary depending upon the point of departure with other evidence. The Board does not accept the proposition that the diary was modified with a view to misleading the Board. In particular, the Board notes that the diary was available for inspection before Mr. Carrozzi and Mr. Roy gave their evidence. However, with various styles of handwriting, different pens, interlineations, deletions and obliterations together with the writing of dates in the past, present and future causes the Board to conclude that Mr. Guilbeault's diary is an enigma within a mystery. There was other evidence before the Board in the form of oral evidence and other documents which enable the Board to reach a conclusion on whether there was a settlement in this complaint.

10. The events which led to this complaint may be traced to an application under section 124 of the *Labour Relations Act* which was filed by Local 527 on April 12, 1988. Ferano was named as the respondent in this proceeding. Local 2041 intervened in that application under section 124. On July 4, 1988 Local 2041 filed this complaint under section 91 of the *Labour Relations Act*. During the month of August of 1988, the Board held pre-hearing conferences with a view to settling this jurisdictional dispute. During the course of these proceedings before the Board, various written descriptions of a possible settlement originated from Local 527, Local 2041 and their solicitors.

It is common ground that a document dated November 30, 1988 contained a written offer of settlement made by Local 2041. The offer stated "construction labourers work shall include:

- (a) the handling and conveying of construction materials including dry-wall and acoustical construction materials on site, from its receipt at the point of delivery, conveying, transport and stockpiling, to the local stockpile if any or if necessary.
- (b) all demolition and wrecking of construction including drywall and acoustical material for scrap, and the cleaning up and clearing away of construction material and debris thereafter.

It is acknowledged that this work is NOT the work of the carpenter or carpenter's apprentice."

11. Local 527 and the District Council have the perception of Local 2041 being required to "yank" the settlement away from Local 527 because WACCA did not want matters settled on the terms of the offer of November 30, 1988. Local 2041 on the other hand view the behaviour of Local 527 as being unfairly opportunistic in purporting to "snap up" an offer of settlement which it knew was no longer on the table for acceptance.

12. After the involvement of WACCA in the circumstances of this complaint in December 1988, Mr. Guilbeault made it clear to Mr. Roy that the offer made by Local 2041 was conditional upon the approval of WACCA. Moreover, in our view, subsequent to the offer of November 30, 1988, Mr. Roy acting upon instructions by Mr. Carrozzi tried to improve the language of the description in the offer to include "to the point of installation" instead of any reference to a stockpile. The Board finds that this occurred prior to January 18, 1989. Such conduct by Mr. Roy constituted a counter-offer and was a rejection of the original offer of November 30, 1988. This counter-offer, of course, nullified the offer of Local 2041. The effect of these events was that the conditional offer which was on the table was to the knowledge of Local 527 no longer on the table as an offer for acceptance. The subsequent conduct in our view amounted to discussions with no further concrete proposals in hand.

13. Although by no means decisive, there is various other evidence before the Board which indicates the state of mind of both Local 2041 and Local 527. At an executive board meeting of Local 2041 which was held on January 10, 1989, the minutes thereof state that Mr. Guilbeault instructed Nelligan & Power to set hearing dates in this matter. The matter referred to is the jurisdictional dispute with the Labourers. In addition at a pre-job mark-up meeting held in Ottawa in December of 1988 with respect to, inter alia, the construction of drywall under an EPSCA collective agreement, Mr. Lecompte attended on behalf of Local 2041 and a Mr. Mullin attended on behalf of Local 527. At that meeting the Labourers were still claiming to tender to carpenters who were installing drywall and metal ceilings. The minutes note that the carpenters disagreed with this claim by the labourers.

14. The Board finds having regard to the foregoing that there was not a settlement of the jurisdictional dispute in this matter. At the continuation of hearing the Board will deal with the third and fourth preliminary issues raised by Local 527 and District Council with respect to the description of the work in dispute and the evidence which is to be adduced before the Board.

0929-88-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Complainant v. Labourers International Union of North America, Local 1089 and **Foster Wheeler Limited**, Respondents

Evidence - Jurisdictional Dispute - Reconsideration - Request by respondent Labourers Union that Board reconsider its ruling to limit evidence of area practice to the demolition of similar structures in an operating environment in the province - Alleged denial of natural justice on the grounds of insufficient notice to parties and predetermination of issues of relevance and weight of evidence - Reconsideration denied - Parties who choose not to prepare themselves to deal with issues raised during a pre-hearing conference do so at their own peril

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Trim* and *N. A. Wilson*.

DECISION OF THE BOARD; May 24, 1989

1. This is a request by the respondent Labourers International Union of North America, Local 1089 ("Labourers Union") for reconsideration of the Board's decision dated February 15, 1989 [reported at [1989] OLRB Rep. Feb. 128]. Each of the parties has made written representations and submissions to the Board in respect of the request for reconsideration.

2. The request is set out in a letter dated April 13, 1989 in the following terms:

We are in receipt of the Decision of the Board dated February 15, 1989 (the "Decision"). Pursuant to Section 106(1) the Respondent, Labourers' International Union of North America, Local 1089 and the Labourers' International Union of North America, Ontario Provincial District Council, request reconsideration of the evidentiary aspects of the said Decision.

At paragraph 12 of the Decision the Board ruled that:

"The evidence to be adduced will be limited to the evidence within the following parameters:

"Only evidence relating to field erected, steam generating boilers, for industrial application, originally erected using Boilermakers, which were or are being dismantled or disassembled in an operating environment in the province of Ontario."

It is respectfully submitted that the Board ought to reconsider this ruling. It constitutes a predetermination of the issues of relevance and weight to be assessed with respect to the evidence to be proffered by the parties. These issues of relevance and weight must be determined by the trier of fact, the Hearing Panel, determining the merits of the jurisdictional dispute (the "Merits Hearing Panel").

As noted in the Decision on page 7, paragraph 11, Labourers' counsel made the following arguments with respect to these issues of natural justice:

"...counsel also argued that to accede to the submissions of Foster Wheeler and the Boilermakers to limit the evidence would be a denial of natural justice as it would result in this panel of the Board 'pre-determining' the case, without having heard any evidence as to what the case is about. In addition, a restrictive ruling in respect of the relevance of certain evidence at this stage of the proceeding would unduly fetter the discretion of the panel of the Board which will hear the merits of this complaint if that panel is a panel different than this one."

Pursuant to Section 102(13) the Board is required to:

“Give full opportunity to the parties to any proceeding to present their evidence and to make their submissions...”

The Board's ruling with respect to the scope of evidence to be accepted by the panel of the Board hearing the merits of this Complaint Concerning Work Assignment in effect violates the statutory obligation contained in Section 102(13), *Statutory Powers Procedure Act*, s.10(b) and (c) and the principles of natural justice. This determination has been rendered by a Board Pre-Hearing Panel and not by the trier of fact, being the Merits Hearing Panel.

It should also be added that, were the Board to schedule the same panel to commence the hearing of the merits of this case as participated in the Decision, it would thereby violate its own Practice Note 15 and specifically paragraph 9 thereof. It must be noted that the Hearing Notice which issued with respect to the proceedings of February 1 and 2, 1989 is contained in the letter from the Board Deputy Registrar dated October 19, 1988, a copy of which is annexed hereto. Clearly, the panel rendering the Decision was constituted as a Pre-Hearing Panel.

Most importantly, the Pre-Hearing Panel accepted the bald assertion by Foster Wheeler and the Boilermakers that a limitation of relevant evidence along the lines sustained by the Decision was warranted. Simply put, that assertion was *NOT* accepted by Labourers' counsel and further was specifically denied. The Pre-Hearing Panel, by the Decision, simply preferred the assertions of the Complainant Boilermakers and Foster Wheeler to those of the Respondent Labourers, without hearing any evidence to prove those assertions. The Pre-Hearing Panel “pre-determined” issues of relevance and weight in the absence of cogent evidence substantiating the assertions of counsel opposite. In addition, clearly, the Pre-Hearing Panel has no jurisdiction to determine practice or procedure relating to the hearing on the merits by another panel of the Board. To do so unduly fetters the discretion of the Merits Hearing Panel and clearly denies full and fair opportunity to present evidence to that Panel.

The motion to limit evidence put forward by counsel for Foster Wheeler and supported by the Complainant Boilermakers, seeks to limit the scope of evidence in self-interest as opposed to a full and complete presentation of the issues to be determined by the Merits Hearing Panel. No evidence was adduced to establish that demolition in connection with the Work in Dispute was significantly distinct from all other forms of demolition to render evidence with respect to these other forms of demolition irrelevant to the considerations of the Board. There was no evidence heard to distinguish:

- “(i) field erected from shop erected boilers;
- (ii) boilers from any other structure or form of construction;
- (iii) construction for industrial application from construction for any other application;
- (iv) construction originally erected using members of Boilermakers Lodge 128 from any other type of construction erected by any other trade;
- (v) demolition in an operating environment from demolition in circumstances where the surrounding installations are not in use,”

in relation to the issues to be determined in these proceedings.

The Pre-Hearing Panel has arbitrarily excluded manifestly relevant evidence relating, *inter alia*, to the demolition of:

- “(a) shop erected boilers;
- (b) any other types of construction including but not limited to other construction for industrial application;
- (c) all types of construction for applications other than industrial application

such as buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works at a site (cf. Section 1(1)(f));

- (d) boilers or any other construction erected by any trade other than members of the Complainant Boilermakers Local 128;
- (e) demolition of boilers or any other construction where the surrounding installations are not in use"

by Labourers.

Simply put, by example, where members of the Boilermakers Lodge 128 perform less than 1% of steam generating boiler installations. Compounded by the fact that boiler demolition "in an operating environment" constitutes less than 1% of all boiler demolition. The arbitrary decision of the Pre-Hearing Panel has limited evidence to be adduced before the Merits Hearing Panel to .01% of available relevant evidence. This example seizes on only two of the limitations imposed by the Pre-Hearing Panel. Of course, the further restrictions simply compound the arbitrariness of the ruling exponentially.

Legal precedent substantiates that issues of relevance and weight must be determined by the trier of fact namely, the Merits Hearing Panel and not by the Pre-Hearing Panel. Any such decision by the Pre-Hearing Panel arbitrarily fetters the determination of the merits of the case.

Algoma Central Railway v. Herb Fraser and Associates Ltd. et al (1988) 66 O.R. (2d) 330 (Ont.Div.Ct.)

Where Chilcott J. at p. 333 states:

"Argument as to admissibility of such evidence at trial and the weight to be attached thereto should be left to be decided by the trial judge."

At p. 335:

"Matters of admissibility and the weight to be given such evidence at trial should be left to the trial judge to determine."

Grand River Conservation Authority [1987] O.L.R.B. Rep. Nov. 1371

Bigras et al v. Canadian National Railway Co. et al (1987) 8 W.D.C.P. 27 (Ont.H.C.)

Re Ontario Public Service Employees Union et al and the Queen in the Right of Ontario (1984) 5 D.L.R.

(4th) 651 (Ont.Div.Ct.)

Where O'Driscoll J. at p. 659 stated:

"A trier of fact may believe all or part or nothing of the evidence of any witness or any exhibit. However, a trier of fact cannot ignore, nor fail to evaluate, nor forget a relevant portion or portions of the evidence. The trier of fact must consider all the evidence before deciding what is believed and what is rejected. If the trier of fact fails to carry out that fundamental responsibility, it results in a denial of natural justice as defined for the Supreme Court of Canada by Dickson J. in *Nipawin, supra*."

Pre-trial or pre-hearing procedures ought to afford maximum latitude [sic] to the parties to present the foundation of their case, leaving questions of relevance and weight to be determined by the trier of fact.

Algoma Central Railway v. Herb Fraser & Associates et al, *supra*, where at p. 334 Chilcott J. states:

"The questions should be allowed at the examination for discovery stage, leaving admissibility and weight to be determined by the trial judge..."

And at p. 336,

"...how can it be said with certainty at the discovery stage that such evidence will or will not be admissible at trial unless that area can be discovered upon? It is a circular argument to say that one cannot ask a question because the answer may be inadmissible unless it falls within certain exceptions. Whether or not the answer falls within the exceptions cannot be determined with precision since the question cannot be asked. While the discovery process should not be a 'fishing expedition', neither should it be unduly restricted by concerns about the admissibility or weight which may be given to the evidence at trial.

"Therefore, such questions may properly be put at the examination for discovery. Matters of admissibility and the weight to be given to such evidence at trial should be left to the trial judge to determine..."

As a secondary matter, it cannot be challenged that Panel rendering the Decision was a Pre-hearing Panel as only the Pre-Hearing Conference was scheduled to take place on February 2, 1982 as provided in the Notice from the Registrar by letter dated October 19, 1988. The direction from the Panel of February 1, 1982 provides insufficient notice to the parties.

Statutory Powers Procedure Act R.S.O. 1980 C. 484, ss. 6(1) and (2)(a)

Rules of Procedure, Regulations and Practice Notes, *Labour Relations Act*, Practice Note 15, paragraph 9

Re Seven-Eleven Taxi Co. Ltd. and City of Brampton et al (1975) 10 O.R. (2d) 677 (Ont.Div.Ct.)

The determination of the bounds of relevance and weight not only must be determined by the trier of fact, the Merits Hearing Panel, but also must be determined on the basis of evidence substantiating the objective criteria used to determine the bounds of relevant evidence. The Pre-Hearing Panel cannot simply determine the criteria on which to base its determination of the bounds of relevant evidence simply by preferring the ultimate assertions of the Complainant and Foster Wheeler on the merits of the dispute.

The Board attempts to rationalize the Decision as follows:

"In our view the reference to 'particular work' in section 91 compels the Board when examining 'employer' and 'area' Practice to inquire into work involving the same or similar type of structure, in the same or similar type of environment."

The Board Pre-hearing Panel has misinterpreted Section 91 to apply legislative guidelines as to the determination of the issue before it, i.e., a Complaint Concerning Work Assignment with respect to "particular work" as circumscribing the bounds of relevant evidence. To take the Decision to its logical and fullest extent, relevant evidence would be limited to solely the performance of the Work Dispute at the particular project involved. This cannot be correct. Work jurisdiction is to be determined in accordance with the criteria considered relevant by the Board. These are:

- (i) collective bargaining relationships;
- (ii) trade agreements as to jurisdiction;

- (iii) Union Constitutions;
- (iv) skills experience and qualifications;
- (v) training;
- (vi) employer practice;
- (vii) area practice;
- (viii) job loss.

Each of these criteria extend well beyond the confines arbitrarily imposed upon “employer” and “area” practice by the Decision. Section 91 directs the Board to determine Complaints Concerning Work Assignment in the context of complaints *over* “particular work”, but does not direct the Board to arbitrarily restrict its consideration of relevant evidence and limit same to solely the performance of that “particular work”.

Accordingly, we respectfully request the reconsideration of the Decision and in particular vacating the oral ruling or direction contained in paragraph 12 thereof.

3. Counsel on behalf of the applicant made the following submissions in respect of the request for reconsideration in a letter dated May 1, 1989:

On behalf of our client, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, we respond to Mr. Wahl’s letter dated April 13, 1989, wherein the Labourers seek reconsideration of the Board’s decision dated February 15, 1989 which resulted from a hearing which took place on February 2, 1989.

We respectfully request the Board to deny this request for reconsideration. The parties were all given a full and complete opportunity to be heard at the hearing on February 2, 1989. Mr. Wahl’s letter does not, in our submission, raise any matters which was not either fully argued on February 2, 1989 or could have been argued at that time. In our submission the Labourers fail to meet any of the Board’s usual tests to allow a reconsideration and thus the request ought to be denied.

Further, the Labourers argue that the Board had no jurisdiction to make the ruling contained in the decision of February 2, 1989. The pre-hearing panel in this matter is the Surdykowski panel and the pre-hearing panel specifically declined to determine the issue of the scope of relevant evidence relating to area and employer practice. Instead that issue was dealt with by a regular panel of the Board on February 2, 1989. The Board has the jurisdiction to make rulings relating to the scope of evidence to be called in any matter, whether at the beginning or during a hearing. As well, although the issue was open to them to raise, the Labourers did not contest the jurisdiction of the Davies [sic] panel on February 2, 1989. There was no reason (and certainly nothing new has developed) to suggest that this issue could not have been raised at that time.

The Labourers further argue that the Board ought to have heard evidence to allow it to determine the scope of relevant evidence. The Labourers could have requested the opportunity to call such evidence on February 2, 1989 but did not do so. In any event, when an objection is made as to relevancy of evidence a party is called upon to demonstrate by submissions why the evidence that it is planning to call is relevant. That party is not allowed to call the challenged evidence to demonstrate its relevancy. Therefore, we submit that such a request made now ought not to influence the Board to reconsider its decision. For the record, we strongly dispute the factual assertions contained in Mr. Wahl’s letter of April 13, 1989.

The Labourers again make submissions relating to natural justice and notice. These submissions are no more than a repetition of matters fully argued and considered by the panel on February 2, 1989 and ought not, in our submission lead the Board to reconsider this matter.

The Labourers final submission is that the Board misinterpreted section 91. In our submission,

this suggestion is clearly without any merit. In making an evidentiary ruling as to the scope of relevant evidence relating to two of the many factors the Board considers under section 91, the Board has, in no way, departed from the accepted criteria considered in section 91 complaints.

For all the foregoing reasons we respectfully request the Board to dismiss this application for reconsideration.

4. Counsel for the respondent employer wrote as follows on April 27, 1989:

We acknowledge receipt of your letter of April 18th, 1989, enclosing a copy of Mr. Wahl's letter of April 13th, 1989, in which he has requested reconsideration of the Board's decision of February 15th, 1989. On behalf of Foster Wheeler Limited, we strenuously object to Mr. Wahl's request for reconsideration and submit that it should be rejected for the following reasons.

1. Mr. Wahl's letter does not make reference to any new evidence which could have been uncovered with the exercise of due diligence prior to the hearing. In fact, Mr. Wahl's letter does not suggest that there is any new evidence at all. Rather, he has simply made a number of arguments which are either restatements of arguments which were made before the Board or which could have been made before the Board.
2. The Board's decision of February 15th, 1989 was not made by a prehearing panel. Rather, it was made by a panel of the Board charged with the responsibility of commencing the hearing. In discharging that responsibility, the Board made the evidentiary ruling which Mr. Wahl is now complaining about.
3. In making its evidentiary ruling, the Board did nothing more than any panel of the Board would be required to do in any case. Whether the issue arises by way of objection of a specific question or line of questions, or whether it arises by way of preliminary submissions, the Board is invariably called upon to make evidentiary rulings relating to the scope of relevant evidence which the parties will be entitled to adduce. It is patently absurd for Mr. Wahl to suggest that such a procedure violates the principles of natural justice.
4. No legitimate purpose would have been served by the Board hearing evidence concerning the scope of evidence to be adduced. In accordance with its normal procedure, the Board made its evidentiary ruling based on the representations of the parties. Counsel for each party had full opportunity and did in fact inform the Board of the evidence which it wished to adduce.

For all these reasons, it is respectfully submitted that Mr. Wahl's request for reconsideration should be denied.

5. In response to these submissions counsel for the Labourers Union wrote on May 12, 1989 as follows:

It is specifically denied that the hearings convened before your panel on February 2, 1989 were before the Merits Hearing Panel and in particular no notice was given to any of the parties that any hearings in connection with the merits of this matter would take place on that day. Specifically as stated in our Request for Reconsideration, the notice to the parties was restricted solely to the pre-hearing conference. Accordingly the hearings held in decision of February 2, 1989 relate to the pre-hearing conference. It is interesting to note that counsel opposite offer no legal basis upon which to refute this assertion.

6. We have considered the extensive submissions of the parties both in support of, and in opposition to the request for reconsideration. We hereby deny the application for reconsideration.

7. The Board's policy regarding reconsiderations has been clearly enunciated in its Practice Note No. 17 which states in part:

Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise.

To this we add that where significant issues of Board policy are raised, the Board may also reconsider its decisions. Generally, however, the Board will not reconsider a decision unless either the applicant party intends to introduce new evidence which could not previously have been obtained by reasonable diligence and such evidence if adduced would be practically conclusive, or the parties intend to raise objections or make representations not already considered by the Board and which the party did not have an opportunity to raise previously. These limits are placed around the exercise of the Board's discretion to reconsider as a recognition of the need for the Board to apply a principle of finality to its decisions so that in the normal course of proceedings a party can safely rely on a decision as establishing the rights between the parties. Without this level of finality the intended expediency of the Board would not be realized. The purpose of the Act and this Board to further harmonious labour relations would be seriously hampered without such level of finality.

8. The request for reconsideration expresses no intention to introduce new evidence. The request does not raise an argument or objection that could not have been raised at the hearing. Indeed, the application seeks merely to reargue matters that were placed before the Board at the time of the hearing or which certainly could have been placed before the Board at the time of the hearing.

9. We do wish to address specifically that portion of counsel's request for reconsideration which is based, in part, on the assertion that this panel of the Board which ruled upon the scope of admissible evidence of employer and area practice was a "pre-hearing panel" and not the "merits hearing panel". Counsel submits that the notice provided to the parties with respect to the proceedings on February 1 and 2, 1989 refers to a continuation of the pre-hearing conference which had commenced on August 16, 1988. Counsel further submits that the notice in respect of the proceedings before this panel of the Board on February 2, 1989 was inadequate and/or insufficient.

10. We do not agree that this panel was a pre-hearing panel. As the decision of February 15, 1989 notes the pre-hearing conference panel (Vice-Chair G. T. Surdykowski and Board members H. Kobryn and W. N. Fraser) "directed that a *hearing* be convened before a panel of the Board... for the purpose of determining the evidence of Area and Employer Practice which the Board will admit in respect of this complaint." This panel of the Board *adjudicated* upon the scope of evidence at a hearing convened for that purpose. This panel was not party to or privy to the pre-hearing conference and our role in adjudicating upon a preliminary matter relating to the evidence differed significantly from the role of a pre-hearing conference panel. As the practice note indicates the purpose of the pre-hearing conference is to settle the dispute or, in the absence of settlement, to narrow the issues in dispute. That this panel was charged with the responsibility of conducting a hearing for the purpose of adjudicating upon a preliminary matter is made clear in the direction of the pre-hearing conference panel which direction was reduced to writing on February 14, 1989.

At the pre-hearing today, February 1, 1989, it soon became evident that the nature and scope of the evidence which is relevant to the complaint is, as a preliminary matter, an issue of some significance with respect to any further proceedings in this matter. The complainant and the respondent Foster Wheeler Limited urge the panel to determine that preliminary issue before proceeding further.

The panel has expressed its view that, having regard to its involvement in the pre-hearing process,

it cannot, or should not, adjudicate that issue. However, another panel of the Board is available to deal with it tomorrow, February 2, 1989, a day already scheduled for a continuation of the pre-hearing conference.

The issue which it is proposed this panel remit to be adjudicated is the scope of the evidence of area and employer practice which the parties will be permitted to adduce in the hearing with respect to the merits of this complaint.

[emphasis added]

After other references to an adjudication of the preliminary evidentiary issue the pre-hearing conference panel concludes:

In all the circumstances, we are not persuaded that there is any cogent reason for the matter not to proceed before a differently constituted panel of the Board tomorrow (February 2, 1989) for the purpose of determining the scope of the evidence of area and employer practice which the Board will admit with respect to this complaint and we so direct.

We note that the Board has not received a request for reconsideration of this direction by the pre-hearing panel.

11. We note also that, although counsel at the hearing made submissions in respect of the sufficiency of notice, no issue was taken in respect of the jurisdiction of this panel of the Board to adjudicate upon the preliminary evidentiary issue. Indeed, it was our understanding that, although the counsel for Labourers objected to the *manner* in which the hearing had been convened, namely that it had been convened without sufficient notice, counsel did not dispute the jurisdiction of the Board to convene a hearing to deal with this type of preliminary issue.

12. In respect of the position that the hearing was convened without sufficient notice we concur with the decision of the Board dated February 14, 1989 in which the pre-hearing panel directed that this matter proceed before us. The adequacy or sufficiency of notice must be assessed in view of all the circumstances. In this instance, the parties received notice that they would have to proceed by way of hearing before a panel of the Board to address an issue of which they had some five and a half months notice. Two of the parties apparently indicated their preparedness to proceed in this manner. The third party, (the Labourers) indicated that it was not prepared to consent to proceed on that basis *notwithstanding* that the issue was "one which has, in large part, been raised by the Labourers International Union of North America, Local 1089 itself." We agree with the comments of the pre-hearing conference panel that it is "not too much to expect, having regard to the pre-hearing process which has been established, that a party be prepared to articulate and argue its position with respect to an issue it has itself raised". In our view, to hold otherwise would make the pre-hearing conference and the provisions of the Board's Practice Note 15 pointless and ineffective.

13. As noted in the decision of the pre-hearing conference panel, in recent months the Board has been advised on various occasions of the concerns in the labour relations community relating to delays in proceedings before the Board. To this we would add that particular concerns have been expressed by the labour relations community involved in the construction industry about the length of hearing required in jurisdictional disputes. In recent times it is not unusual to find that jurisdictional disputes take a considerable number of hearing dates to adjudicate. These dates are inevitably spread over several months because of the unavailability of counsel or the scheduling difficulties of the Board, consent adjournments of the parties, etc. The Board's Practice Note 15 in respect of jurisdictional disputes is one method by which the board has attempted to expedite the hearing of jurisdictional disputes. Logic supports the proposition that the number of hearing dates required for the adjudication of jurisdictional disputes may well be less, (and consequently sched-

uling of the cases may well be more efficient,) if the parties effectively use the pre-hearing conference to (a) articulate the issues in dispute and the material facts upon which each party intends to rely in support of its position, and (b) narrow the issues in dispute between the parties through full and frank disclosure of all matters arising as a result of the jurisdictional dispute.

14. Effective use of the pre-hearing conference is not attained if parties are unwilling or unable to argue or articulate their positions during the conference. Parties who choose not to attend a pre-hearing conference, or who choose not to prepare themselves to deal with the issues raised during a pre-hearing conference do so at their own peril. They also do a disservice to other parties and to the Board. In light of these circumstances we also concur with the comments expressed by the pre-hearing panel and view the notice provided as sufficient.

15. If these comments appear unduly harsh or critical to counsel who argued the matter before us they are not made for that purpose. Indeed, Mr. Gold in his submissions before this panel at the hearing very thoroughly and ably put forth the position of the Labourers. His arguments before the Board, and the submissions contained in Mr. Wahl's letter requesting reconsideration are not materially different. Mr. Wahl's letter in substance makes many of the same or similar representations made by Mr. Gold at the hearing. We note also that we do not accept counsel's written submissions that the evidentiary ruling made somehow departed from the usual criteria which the Board considers in the adjudication of section 91 disputes. The ruling goes merely towards the scope of the evidence in respect of two of the criteria which the Board normally considers.

16. In light of the fact that the application does not disclose any adequate grounds for reconsideration, we hereby deny the application for reconsideration and affirm the decision of February 15, 1989.

2215-88-U Nurdin Kalla, Complainant v. Amalgamated Transit Union, Local 113, Respondent v. Toronto Transit Commission, Intervener

Duty of Fair Representation - Unfair Labour Practice - Union officials handling a bump - Employer challenging one of the job placements - Union and employer making special arrangements for employee after union admitted employee was not qualified for the job - Employee farther down in bumping line bringing fair representation complaint - Complaint dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *Nurdin Kalla* for the complainant; *James Fyshe*, *Mike Valentini* and *Ray Hutcheson* for the respondent; *Susan J. McDermott*, *Ian Lane*, *Bob Allan* and *Bruno P. Iannacito* for the intervener.

DECISION OF THE BOARD; May 8, 1989

1. This complaint was filed under section 89 of the *Labour Relations Act*. It alleges that the Amalgamated Transit Union, Local 113 ("the Union") has dealt with Kazim Kassim and Sid Brechin, who are named as grievors in the complaint, contrary to the provisions of section 50 of the Act. When the complaint came to hearing, the complainant, Nurdin Kalla, Union counsel and

counsel for the Toronto Transit Commission (hereafter "the Commission" or "the Employer"), told the Board that they agreed that the complaint should have alleged a violation of section 68 of the Act and not section 50. They were content to have the complaint amended and decided as a complaint alleging violation of section 68. The Board accepted their agreement and amended the complaint accordingly.

2. The grievors Kassim and Brechin were not present at the hearing and an issue arose about whether they should be made co-complainants with Kalla. Kalla did not claim to be their agent and, except for the fact that they were named as grievors in the complaint alleging a violation of section 50 of the Act, there was nothing before the Board to show that they were making a claim that their rights under section 68 of the Act had been violated. In these circumstances, the Board finds that Kassim and Brechin are not parties to the amended complaint.

3. Section 68 of the Act provides that:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Kalla alleges that the union failed its duty described in section 68 because of certain actions taken by its officers in carrying out what the parties referred to as a "bump" under the seniority regulations applicable to job classifications in the Commission's maintenance departments. A bump is a process by which employees who, as a result of a transfer of work or a layoff, suffer any loss of shift, location, off-days or job classification, can claim jobs held by employees with less seniority. The regulations call for union officers to handle the bump but the Employer can challenge a job placement if it believes the employee lacks the qualifications, ability and experience to do the job.

4. The Commission advised the Union that a bump was going to be needed in the Carhouse Section of the Equipment Department. The Equipment Department is one of the four maintenance departments covered by the seniority regulations. The Commission named 11 employees who qualified to start a bump by claiming jobs of junior employees. The responsible union officials applied the seniority regulations to determine the choice or choices available to those employees. As each employee selected the job which he would bump into, the displaced employee would exercise his seniority to select the job he wished to bump into. The process repeats itself until the last employee is either laid off or fills a vacant job. Each of the 11 employees elected to displace an employee with less seniority and started one of these chain reactions. The history of each chain is part of an exhibit in this proceeding. Each chain is referred to as a bump and has a number assigned to it.

5. Kalla is part of the chain referred to as bump #2. That bump was started when Mr. B. Carlevaris claimed the job of I.C.T.S. Analyzer at the McCowan Carhouse. His claim displaced Sid Brechin, one of the grievors named in the original complaint and, when Brechin exercised his bumping rights, his fellow grievor, Kazim Kassim, was displaced. As the bump progressed, the complainant Kalla was displaced from his job as Carhouse Emergency Repairman at the Russell Carhouse, on day shift. He took the job of Carhouse Electrical Analyzer, on night shift, at the same location. He was the fourth person displaced in bump #2.

6. When the Commission was advised of Brechin's displacement by Carlevaris, and before the bump had reached Kalla, it questioned Carlevaris' qualifications for the I.C.T.S. Analyzer job. It was the Commission's position that he was not eligible to bid for that job because he had not undergone certain training course requirements for the job. The Union took the position that Car-

levaris was eligible to bid for it because of a grandfather arrangement which had been concluded between the Employer and the Union in 1986. The two parties maintained those positions through a series of meetings between different levels of Commission managers and Union officers. The Union officers eventually became concerned that their interpretation of the grandfather arrangement might not stand up at arbitration if the Commission proceeded with a grievance on the issue. By this time, the bump had been completed and there was another employee in bump #4 who was in the same predicament as Carlevaris. When the Union relented from its claim that they were qualified for the I.C.T.S. Analyzer jobs, the Union officers realized that, if the seniority regulations were followed, the two employees would be left either to bid on existing vacancies or pass a trades test which would qualify them for the Analyzer jobs. It was considered a foregone conclusion that the employees would be left to take the best of whatever jobs were vacant. The Commission and the Union shared the view that such a result was not a desirable one, so there were further meetings between their representatives at which they discussed other options to a straightforward application of the seniority regulations.

7. Those discussions led to the Union considering four options:
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- (1) place the two employees in remaining vacant jobs;
- (2) give them the trade test;
- (3) administer a mini bump for them; and
- (4) combine (3) with reinstating the employees who had been displaced from jobs by bumps #2 and #4 in the jobs from which they had been displaced.

Options (3) and (4) were exceptions to the seniority regulations. Michael Valentini, an assistant business agent of the Union who was responsible for the maintenance departments, placed those options before a meeting of the Carhouse Section stewards. Fernando Mastrangelo, Union board member responsible for the Carhouse Section, was at the meeting also. His is a higher office in the Union's hierarchy than Valentini's. The first two options would apply if the seniority regulations were followed. They were discarded in favour of the mini bump because the available vacant positions were unsuitable considering the seniority of the two employees and it was anticipated that their first (and in this case, only) chance with the trade test would not be successful. The fourth option was rejected on the advice of the steward who had administered the two bumps that three employees who had bumped into other jobs in bumps #5 and #6, were eligible to bump into the I.C.T.S. Analyzer job and would do so if bumps #2 and #4 were reversed. Valentini testified that all 11 bumps would "cave in", to use his words, if that happened.

8. Valentini advised the Commission of the decision taken at the meeting and that the problem would have to go to a membership meeting of maintenance departments employees and a general membership meeting. The first of those meetings approved the decision taken at the stewards' meeting. The same motion was passed at the general meeting, but the meeting also asked Valentini to ask the Commission if bumps #2 and #4 could be reversed. The general meeting had been held on a Sunday. Valentini testified that he was unable to get a meeting with the appropriate Commission staff and Union officers until the following Friday. The Union was represented at the meeting by its president, Valentini and Mastrangelo. When the Commission was asked if bumps #2 and #4 could be reversed, the Union was told it was too late because the effective date of the moves was Sunday, two days hence, and employees were already scheduled for Sunday shifts.

9. Kalla attended both meetings of Union members and was able to express his dissatisfaction with the administration of bumps #2 and #4 and to press his own case for having them reversed.

10. Kalla argues that the Union breached its duty of fair representation under section 68 of the Act when administering the bump because of the conduct of its officers at two stages of the bump. First in making the original decision that Carlevaris was qualified for the I.C.T.S. Analyzer job. Second, in the method worked out with the Commission to rectify the results of that decision once the Union admitted its error. That conduct, Kalla submits, constitutes a failure to represent his interest in the bump, causing him to be displaced from his job. As the Board understands Kalla's argument, the conduct of the Union officials in the first instance was both arbitrary and discriminatory. It was arbitrary because they acted negligently in failing to make sure Carlevaris was eligible under the grandfather arrangement to bid for the I.C.T.S. Analyzer job before allowing him to bump into the job, and continued to act negligently when they maintained their position after being challenged by the Employer. If they had relented earlier, they could have interrupted the bump before too many moves had happened. That conduct, Kalla argues, was discriminatory as well, because their decision to allow Carlevaris to bump into the I.C.T.S. Analyzer job, gave him an opportunity for which he was not eligible. In doing so, they acted to the detriment of Kalla and the other employees who were displaced from their jobs because of his bump. Thus Carlevaris received preferential treatment compared to Kalla and the other employees and, according to Kalla, that was discriminatory treatment contrary to section 68. He argues further that the preferential, and therefore discriminatory, treatment continued in the second instance when the Union officials worked out a special accommodation with the Commission after admitting that Carlevaris was unqualified for the I.C.T.S. Analyzer job, instead of following the seniority regulations. The remedy Kalla seeks for these alleged violations of section 68 is to be reinstated in the job from which he was displaced as a result of the Union's alleged unlawful conduct.

11. Union counsel argued that the appropriate standards against which to assess whether the Union has acted in a manner which is arbitrary, discriminatory or in bad faith in its representation of Kalla, are those described in *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791, at paragraph 12:

...In defining the type of misconduct contemplated by the Legislature the Board requires that a trade union not act "arbitrarily" in the sense that it fails to address itself to the particulars of an employee complaint and thereby disposes of it without regard to its merits. In short, a union is constrained from treating employee complaints in a capricious or perfunctory manner. A trade union must not act "discriminatorily" in that the benefits of representation are conferred one member of the bargaining unit and denied another without reasonable excuse. Like situations ought to be treated in a like manner and without favour to any one individual. And finally a trade union must act in good faith and without malice or hostility to the complainant. An employee is entitled to be represented by his trade union with candour and with honesty in connection with the disposition of his concerns. A trade union that declines upon proof thereof to satisfy these simple employee expectations will be liable to pay the penalties contemplated by the remedial provision of *The Labour Relations Act*. (See: *The Alfred Compton* case OLRB M.R. October 1972 917; *El Mocambo* case OLRB M.R. October 1972 862; *The Joseph Pap* case OLRB M.R. January 1974 60).

The Board in that case arrived at its definition of the standards to be applied to complaints under section 68 of the Act after reviewing the Board's existing jurisprudence. The standards endure today and, in the view of this panel of the Board, are applicable to the facts in this case. There is no claim that the Union has not acted in good faith, therefore it is a matter of deciding whether the Union has acted in an arbitrary or discriminatory manner in its representation of Kalla.

12. The situation confronting the Board in this complaint differs in one respect from most

complaints alleging violation of section 68 of the Act. That is the reversal of the traditional roles of employee bargaining agents and employers in administering collective agreements. At least in Canada and the United States, the historical role of employers and trade unions in collective bargaining relationships has been for the employers to act and the trade unions to challenge the employers' actions if they disagree with them. Thus where the bumping provisions of a collective agreement are triggered, the employer usually identifies the jobs into which employees can bid or to which they can be transferred. The union usually challenges the employer if it believes the employer has not applied the bumping provisions correctly. Here it was the Union who decided the eligibility of employees to bump into particular jobs and the Employer decided whether a particular job placement should be challenged. In the Board's view, the duty of fair representation owed to employees in a bargaining unit has the same relevance in circumstances like these that it has in the more usual circumstances.

13. The facts respecting the placement of Carlevaris in the I.C.T.S. Analyzer job are that the responsible Union officials considered his qualifications and the applicability thereto of the grandfather arrangement. They decided that he was protected by the terms of the grandfather arrangement and was eligible to bid for and bump into the job. They defended that decision when the Employer challenged it, but ultimately decided that their interpretation of the grandfather arrangement might be difficult to prove at arbitration. It is implicit in Kalla's claim that the Union officials' conduct was both arbitrary and discriminatory, that they knew or ought to have known that Carlevaris was not entitled to the protection of the grandfather conditions in the circumstances of the bump. The evidence simply does not support that claim. Nor does it support Kalla's claim that the Union discriminated against him because its officials gave Carlevaris favoured treatment by allowing him to bump into the I.C.T.S. Analyzer job when they knew or should have known that he was not eligible to do so. There is nothing in the evidence before the Board from which it would be reasonable to draw the inference that the Union officials acted capriciously or perfunctorily when they decided that Carlevaris was eligible to bump into the I.C.T.S. Analyzer job. Clearly they considered his skills and experience qualifications and seniority, put their collective mind to the question of whether his circumstances were protected by the grandfather arrangements and concluded that he should be allowed to bump into that job. Similarly, there is no evidence from which it would be reasonable to infer that the interpretation which they gave to the grandfather arrangements when they decided that Carlevaris was protected by them was any different than they have given previously, or would give in the case of any other employee with similar skills, experience and seniority. As unfortunate as it was for Kalla to have been bumped from his job, that result does not convert the actions of the Union officials who made the decision into conduct by the Union which contravenes section 68 of the Act.

14. The fact that the officials later concluded that the Union might not have a winning case at arbitration on its interpretation of the grandfather arrangement does not make their original decision arbitrary or discriminatory. Even if their conclusion was taken as an admission that they had wrongly decided Carlevaris' eligibility for the I.C.T.S. Analyzer job in the first instance, had exercised poor judgement in making the decision or had demonstrated a lack of awareness about whether Carlevaris was protected by the grandfather arrangement, their conduct would not amount to arbitrariness contrary to section 68. The Board has consistently held that the section does not protect employees from such shortcomings. See, for example, *Diamond "Z"*, *supra*, and *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001. Therefore, the facts do not support a finding that the Union acted in an arbitrary or a discriminatory manner in its representation of Kalla's interests either when its officials decided Carlevaris was eligible to bump into the I.C.T.S. Analyzer job or when they continued to stand by the decision even after the Commission challenged the decision and until the bump was completed.

15. The Board turns now to the question of whether, as a result of the Union officers negotiating a special accommodation for Carlevaris after they admitted he was not qualified for the I.C.T.S. Analyzer job, the Union discriminated against Kalla contrary to section 68 of the Act. The facts show that the Employer and Union representatives dealing with the bump arrived at the consensus that a strict application of the seniority regulations to Carlevaris' situation would produce an unsatisfactory result. They sought an alternative solution. Their efforts resulted in the Union considering the four alternatives described above at paragraph 7, putting them before the general membership, and choosing the "mini bump" option to resolve the problem with Carlevaris. The fact that the Union chose a solution not provided for in the seniority regulations does not make it a discriminatory act *vis a vis* Kalla. Article 12 of the collective agreement expressly provides for the parties to modify its provisions. There were no adverse consequences for Kalla. He stood in the same position whether Carlevaris accepted a vacant position in accordance with the seniority regulations or bumped into another job through the "mini bump" special arrangement. Kalla was not in the same situation as Carlevaris, so Carlevaris has not been given beneficial treatment which was not available to Kalla. Therefore, the way the Union has dealt with Carlevaris has not resulted in discriminatory treatment of Kalla.

16. For all of the foregoing reasons, the Board finds that the Union has not acted in a manner which was arbitrary or discriminatory or in any way which violates section 68 of the Act. Accordingly, the complaint is dismissed.

1689-88-U Luis Lopez, Complainant v. Canadian Union of Public Employees, Respondent

Duty of Fair Representation - Unfair Labour Practice - Whether a trade union's duty of fair representation obliges it to represent bargaining unit employees in connection with workers' compensation proceedings - Extent of duty is co-extensive with the union's authority as exclusive bargaining agent - Union's duty does not extend to workers' compensation claims - Complaint dismissed

BEFORE: S. A. Tacon, Vice-Chair.

APPEARANCES: Luis Lopez on his own behalf; Brian Sheehan and Jack White for the respondent.

DECISION OF THE BOARD; May 1, 1989

1. The name of the respondent is amended to read: "Canadian Union of Public Employees".

2. This is a complaint alleging violation of section 68 of the *Labour Relations Act* in the respondent trade union's decision not to represent the complainant before the Workers' Compensation Appeals Tribunal (WCAT) with respect to his claim. The union did represent the complainant at the Workers' Compensation Board (WCB) hearing. The complainant wishes to initiate legal proceedings in the courts, as well, seeking to challenge the WCB decision on the ground that the WCB violated the complainant's rights under the *Canadian Charter of Rights and Freedoms*. The relief sought by the complainant in the section 68 complaint consists of a declaration that he has the right to be represented by the union with respect to his workers' compensation case wherever

this is dealt with in legal proceedings and, specifically, that the Board direct that the union finance the complainant's court challenge with respect to the workers' compensation case raising the *Charter* issue, i.e., that the union pay the costs of a lawyer selected by the complainant.

3. The complainant appeared without legal counsel. The Board indicated that, while it is not necessary to be so represented and the Board not infrequently hears complaints wherein one or both parties appear on their own behalf, Board hearings are legal proceedings which, while not conducted as formally as in the courts, do determine questions of liability in the context of evidentiary and jurisprudential principles. In this instance, the Board described the hearing process as consisting of two parts: the evidentiary portion wherein the parties must place before the Board, through witnesses or documents, evidence from which the Board may make its findings of fact; and, then, the argument, wherein each party has the opportunity to comment on the evidence, to tell the Board what legal conclusion each feels can be drawn from the evidence. The Board also stated that the Board could explain its procedure but could not advise a party.

4. A translator was provided. In accordance with the complainant's preference, all statements in English were translated into Spanish, but the complainant stated he would try to reply in English unless he felt he could not adequately do so, in which case he would speak in Spanish and his statements would be translated into English. The Board noted that the translator could not advise the complainant but was merely to translate statements from English to Spanish and vice versa. The Board also directed the translator, before the complainant was called upon for submissions on the preliminary motions (see *infra*), to translate specific passages referred to in the case law cited by respondent counsel and, as well, to translate any other passages in those cases upon the complainant's request.

5. Counsel for the respondent raised three preliminary motions seeking dismissal of the complaint without a hearing on the merits. The Board explained to the complainant that each party would have an opportunity to make submissions with respect to the preliminary motions. Those submissions are next briefly set out.

6. Respondent's counsel stated that, while the union sympathized with the complainant's circumstances, the union had fulfilled its obligation under section 68 of the Act. Counsel noted the complaint, as filed, was somewhat difficult to comprehend but appeared to focus on two areas, namely, that the union was not taking action with respect to the violation (admitted by the WCB) of section 77 of the *Workers' Compensation Act* (the WCA) in disclosing medical records, and that the union did not provide a lawyer to the complainant at the WCAT hearing or otherwise represent him at that hearing. The three preliminary motions raised by the respondent concerned: the jurisdiction of the Board to hear the complaint; whether the complaint disclosed a *prima facie* case; and the remedy. With respect to jurisdiction, counsel submitted that the section 68 duty exists solely with respect to the employee's relationship with the employer and is restricted to collective bargaining rights. In the instant case, the complainant had been terminated from his employment with the Toronto General Hospital whereas the representation sought as relief in these proceedings was vis-a-vis the WCAT. Counsel argued that such representation fell outside the scope of section 68 notwithstanding that there may be "employment" consequences. With respect to the second preliminary motion, counsel argued that the complaint, as filed, did not disclose in what way the union violated its duty of fair representation and, so, did not disclose a *prima facie* case. In this regard, counsel stressed that there is no positive duty on a trade union to provide counsel to the complainant in order to challenge the release of medical documents by the WCB contrary to section 77 of the WCA or in order to argue these (and other) points on the complainant's behalf at the WCAT. Finally, as regards remedy, counsel contended that the Board could not properly direct the relief requested, i.e., that the union provide counsel to the complainant in connection with the

WCAT proceedings or that the union initiate proceedings in the courts challenging the release of medical records by the WCB. It was argued the remedy was too remote from an appropriate exercise of the Board's remedial authority under section 68 of the Act as no outcome of the proceedings at the WCAT or in the courts would result in the return of the complainant to the bargaining unit because neither the courts nor the WCAT had the authority to direct reinstatement. Cases cited in support included: *Conestoga College of Applied Arts & Technology*, [1983] OLRB Rep. June 882; *Cryovac*, [1983] OLRB Rep. June 886; *General Motors of Canada Limited*, [1982] OLRB Rep. Feb. 181; *Betty Lavoie*, [1981] OLRB Rep. Aug. 1098; *Registered Psychiatric Nurses' Association of British Columbia*, [1980] 1 Can. LRBR 441.

7. The complainant was afforded full opportunity to make submissions on the preliminary motions. The complainant reviewed the complaint, referring to and quoting from the material filed by him. He distinguished the cases cited by respondent's counsel, asserting each case was different and whether the Board had jurisdiction should be decided solely with respect to this complaint itself. The complainant stated he had no complaint about the union representation at the WCB stage but submitted the union, having represented him before the WCB, was obliged to continue that representation at the WCAT and to pursue the apparent violation by the WCB of section 77 of the WCA. Indeed, he argued he was still entitled to be represented by the union before the WCB with respect to a new "psychogenic" pain claim he wished to raise. The complainant submitted that he was represented by the union while he was a bargaining unit employee at the Toronto General Hospital (where he last worked in December 1985) and, thus, should be represented by the union at the WCAT. In effect, the complainant sought a declaration that the union had to represent him before the WCB in connection with this "psychogenic pain" complaint he wished to pursue as well as in representation at the WCAT and in the courts.

8. Counsel for the respondent stressed that the WCAT hearing had already taken place and the Board had no authority to direct a new hearing. Counsel again emphasized that there was no factual basis in the complaint on which to ground an assertion that the union had been arbitrary or discriminatory or had acted in bad faith when it decided not to represent the complaint at the WCAT.

9. The Board stated at the hearing that its decision on the preliminary motions was being reserved. The Board explained to the complainant that, if any of the preliminary objections were upheld, the complaint would be dismissed without a hearing on the merits. If the complaint was not dismissed on any of the preliminary grounds, new dates would be set for hearing of the merits. It is useful to note one other matter at this point. At the commencement of the hearing, the Board asked if there were any preliminary matters. Only the respondent's counsel responded, although the complainant did request confirmation that a witness he had summonsed to testify on his behalf was present. [The individual was in attendance.] In his submissions on the preliminary motions, the complainant stated he was not represented at the Board hearing because he had filed a written request seeking postponement of the case. The Board informed the complainant that the Board's practice was not to grant adjournments except on consent of both parties or in exceptional circumstances which would not include scheduling a hearing for the convenience of counsel to one of the parties where notice of the hearing was given and an opportunity to retain counsel afforded. In the instant case, the union had not consented to the adjournment request by the complainant. Moreover, the Board pointed out that the complainant had not raised this issue before the Board until the conclusion of his submissions on the preliminary motions. In response, the complainant confirmed that he had not requested the adjournment because his counsel could not attend today's hearing, but because he could not afford a lawyer and wished to delay matters until January 1989. However, there was no suggestion that the complainant would be able to afford counsel at that point or had taken steps to obtain legal aid. In essence, the complainant was seeking an unlimited

delay in hearing a complaint he filed on October 13, 1988 and which had been scheduled for hearing on December 6, 1988.

10. The factual context relevant for purposes of the preliminary objections is undisputed and may be succinctly stated. The complainant was terminated from his employment at the Toronto General Hospital in 1985. Prior to his termination, the complainant was an employee in the bargaining unit represented by the respondent. The trade union represented the complainant before the WCB. The complainant wished to appeal the WCB decision, in part, to the WCAT, to pursue an apparent breach by the WCB of section 77 of the WCA in releasing medical documents and to be represented by the union in those processes. The complainant asserts the section 77 issue involves a violation of his rights under the Charter. It appears the complainant also seeks a Board order directing the union represent him at another WCB hearing dealing with a “psychogenic pain” complaint he wished to file.

11. The issue squarely raised in these proceedings is the ambit of the obligation imposed by section 68 of the Act. Is the trade union obliged to represent bargaining unit employees in connection with WCAT proceedings in the sense that a specific decision not to so represent the complainant in the instant case is subject to scrutiny by the Board to ensure that that decision was not arbitrary, discriminatory or in bad faith? Further, is it relevant to the analysis that the union did represent the complainant before the WCB?

12. It is appropriate to first reflect on the history and purpose of section 68 of the Act which reads:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

While the section is couched in broad terms (“shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit”), the Board regards the duty of fair representation as restricted so that the extent of the duty is coextensive with the extent of the union’s authority as exclusive bargaining agent. The duty of fair representation was enacted as a counterweight to the restrictions on individual employee rights inherent in the creation of a collective bargaining regime in which the bargaining agent was granted exclusive rights to bargain on behalf of all employees in the bargaining unit, whether or not union members. The duty of fair representation serves to protect the individual from decisions of the bargaining agent which could be characterized as arbitrary, discriminatory or in bad faith. In effect, given that the trade union would likely be more responsive to the wishes of the majority, the individual was afforded some protection against the “tyranny of the majority” since the advent of a collective bargaining regime had, for all intents and purposes, eliminated the individual’s common law right to negotiate an individual contract of employment. Thus, the context in which the section 68 duty arises and its purpose constitute the rationale for defining the ambit of the trade union’s statutory obligation to fairly represent the employees in the bargaining unit.

13. In elaborating on the Board’s conclusion, it is useful to briefly sketch the American jurisprudence dealing with the duty of fair representation which arises in a judicial context in that jurisdiction but which was influential in the adoption here of a statutory duty of fairness. The duty developed through a series of cases including *Steele v. Louisville & National Railroad*, 15 LRRM 708 (1944); *Tunstall v. Locomotive Firemen*, 15 LRRM 715 (1944); *Wallace Corp. v. NLRB*, 15 LRRM 697 (1944); *Humphrey v. Moore*, 55 LRRM 2031 (1964); *Ford Motor Co., v. Huffman*, 31 LRRM 2548 (1953). The far-reaching decision in *Vaca v. Sipes*, 64 LRRM 2369 (1967) firmly

established the duty of fair representation as an obligation imposed on an exclusive bargaining agent with respect to representation of employees in the bargaining unit both in collective bargaining and in the enforcement of a collective agreement. While the focus of the jurisprudence prior to and since *Vaca v. Sipes* was on the quality of representation and the appropriate standard for evaluation of the representation afforded to an individual bargaining unit member, a common theme in the cases links the issue of the duty of fair representation to the employer's conduct in that the remedy for breach may well run to both the union and the employer.

14. A few cases have commented more directly on the ambit of the duty rather than solely on its content. In *Hines v. Anchor Motor Freight, Inc.*, 91 LRRM 2481 (1976), Mr. Justice White, for the U. S. Supreme Court, stated (at 2484):

Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of the individual employee to the collective interests of all employees in a bargaining unit," *Vaca v. Sipes*, 386 U.S. 171, 182, 64 LRRM 2369 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation" *Humphrey v. Moore, supra*, at 342, 55 LRRM at 2034.

The self-limiting reach of the duty was expressed thus in *Freeman v. Teamsters, Local 135*, 117 LRRM 2873 (C.A. 7, 1984) at 2875:

A union's statutory duty of fair representation is coextensive with its authority under s 9(a) of the National Labour Relations Act, 29 U.S.C. s 159(a), to act as the exclusive representative for the members of the collective bargaining unit. *Schneider Moving & Storage, Co. v. Robbins*, 104 S.Ct. 1844, 1851 n.22, 101 LRRM 2365; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 46 n.8, 101 LRRM 2365; *Kolinske v. Lubbers*, 712 F.2d 471, 481, 113 LRRM 2957 (D.C. Cir. 1983). The scope of the duty of fair representation, however, extends no further. If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation. *Dycus v. NLRB*, 615 F.2d 820, 827, 103 LRRM 2686 (9th Cir. 1980); *Kuhn v. National Ass'n of Letter Carriers, Branch 5*, 528 F.2d 767, 770, 91 LRRM 2177 (8th Cir. 1976). "[A] union ... can be held to represent employees *unfairly* only in regard to those matters as to which it represents them at all - namely, 'rates of pay, wages, hours ... or other conditions of employment.'" *International Brotherhood of Teamsters, Local No. 310 v. NLRB*, 587 F.2d 1176, 1183, 98 LRRM 3186 (D.C. Cir. 1978) (quoting 29 U.S.C. s159(a)).

The rationale that the union's obligation to represent is necessarily limited to the arena circumscribed by the collective agreement for the reason that that arena defines the scope of the union's exclusive authority to act for its members is echoed in other Court of Appeals decisions including: *Bass v. Boilermakers, Local 582*, 105 LRRM 3258 (1980); *Smith v. Local No. 25, Sheet Metal Workers*, 87 LRRM 2211 (1974); *Kolinske v. Lubbers*, 113 LRRM 2966 (1983); *International Brotherhood of Teamsters, Local No. 310 v. NLRB*, 98 LRRM 3186 (1978); *Price v. The Automobile Workers*, 122 LRRM 3130 (C.A. 2, 1986).

15. These just-noted cases have arisen in the context of the courts' refusal to extend the duty to internal union affairs, subject to circumstances wherein the internal policies and practices have a substantial impact on members' rights relating to the negotiation and administration of a collective agreement: *Retana v. Elevator Operators Union*, 79 LRRM 2272 (1972). Less frequent are cases involving the attempted application of the duty of fair representation to obligate the union in respect to matters external to the union and the collective bargaining relationship: *Hawkins v. Babcock & Wilcox Co.*, 105 LRRM 3438 (1980); *Eason v. Frontier Airlines*, 106 LRRM 2268 (C.A. 10, 1981). The latter case, *Eason v. Frontier Airlines*, concerned an allegation that the union had breached its duty of fair representation by refusing to process a grievance, arising from a workplace injury, against the employer. The Colorado workers' compensation legis-

lation precluded an action against the employer. For this reason, the court stated the grievance would accomplish nothing and commented that the:

...plaintiff may not convert a claim for personal injury in the course of employment to a claim against the union for unfair representation. We agree with the trial court that it would be anomalous to expose the Union to a claim for that inquiry when Colorado law provides an exclusive remedy for the injury.

This conclusion assumes that the duty of fair representation is confined to the collective bargaining process and recognizes that the absence of a remedy beyond that provided by workers' compensation legislation renders the representation issue moot.

16. Thus, the American jurisprudence has recognized, generally by implication but on occasion expressly, that the duty of fair representation reaches only as far as the scope of the union's role as exclusive bargaining agent in the context of collective bargaining matters.

17. The Board's elaboration of the content of the duty of fair representation has drawn on the American jurisprudence. The decisions have focused on the quality of representation afforded the individual bargaining unit member but implicit in the leading decisions is the confinement of the duty to matters arising out of the collective agreement and/or the collective bargaining relationship with the employer, that is, the areas wherein the *Labour Relations Act* confers exclusive authority on the union: *Donald G. Gebbie*, [1973] OLRB Rep. Oct. 519; *Walter Princesdomu*, [1975] OLRB Rep. May 444; *Myrna Wood*, [1981] OLRB Rep. Feb. 137; *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418.

18. The ambit of the section 68 duty rather than its content has been briefly addressed in the context of complaints concerned with internal union affairs. The Board has consistently refused to extend the section 68 duty into matters properly characterized as internal union affairs because representational rights with respect to an employer are not involved: *Arthur Joseph Roberts*, [1974] OLRB Rep. Mar. 169; *Mario Moreira*, [1980] OLRB Rep. July 1039; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; *Angelo Moro*, [1983] OLRB Rep. Aug. 1354; *Michael Connolly*, [1987] OLRB Rep. Feb. 193; *Ronald Lewzoniuk*, [1984] OLRB Rep. Jan. 48; except where the union's conduct pursuant to its usual practice has a direct impact on the right of an employee to grieve (*R.C.A. Limited, Prescott*, [1974] OLRB Rep. Jan. 60). It is useful to set out the following passage from *Sylvia Colalillo*, *supra*, which briefly reviews the Board's reasoning in this area:

3. ... The dispute was solely between the complainant and her trade union, and this is the primary problem which the complainant is faced with in these proceedings. The real issue between the complainant and the respondent is the complainant's eligibility to run for the Union position of steward, and the employer understandably has taken no position on that matter. The duty of fair representation in section 68 on the other hand, is concerned only with the representation by a trade union of an employee *vis-a-vis his or her employer*. See *Ford Motor Company*, [1973] OLRB Rep. Oct. 519; *Myrna Wood*, [1981] OLRB Rep. Feb. 137; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Softley Cartage*, Board File No. 1347-81-U, released May 26, 1982. It is only because the employee's normal rights to deal directly with the employer are circumscribed by collective-bargaining law that the duty of fair representation arises. As the Board stated in *Frank Manoni*, *supra*, at paragraph 11:

...The arbitrary, discriminatory or bad faith conduct, directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees at the *hands of their employer*.

As the Board also noted in *Mario Moreira*, [1980] OLRB Rep. July 1039:

...this Board has no specific authority under the Act to undertake any sort of watch-dog role over a union's internal processes under its constitution and by-laws.

And also in *Arthur Joseph Roberts*, [1984] OLRB Rep. March 169 the Board stated:

8....the duty of fair representation owed by a trade union to an employee under section 60 [now section 68] of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour *vis a vis* its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v. Kuzych* (1951), A.C. 585; *Lee v. Showmans Guild* (1952), All. E. R. 1175; *Orchard v. Tunney* (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v. Cunningham* (No. 1) (1959), 20 D.L.R. (2d) 377; *Jurak et al v. Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v. Freeman et al* (1958), 26 W.W.R. 546).

4. The only aspect of the present complaint touching upon the employment relationship as such is the fact that the collective agreement does provide a kind of super-seniority for area stewards in the event of lay-off and the complainant points out that had she been permitted to run for election, she might today be still employed in the plant in the place of the incumbent area steward. This, however, is obviously not the basic reason why stewards are provided for, and the complainant does not put this consideration forward as a significant element of motivation either on her part, in seeking the nomination, or, more importantly, of the respondent in denying her that status. The matter of super-seniority was, the complainant concedes, not even raised with the respondent at any time prior to the filing of this complaint. It is, in other words, an issue wholly incidental to the real dispute which arose between the parties, being the matter of eligibility for internal trade union elections, and is not sufficient to clothe the Board with jurisdiction.

19. Beyond the cases dealing with internal union affairs, few decisions expressly consider the reach of the duty of fair representation. In *Percy Woods*, [1972] OLRB Rep. Apr. 353, the complainant alleged a breach of the section 68 duty, *inter alia*, in the union's refusal to pursue a further appeal of a WCB claim wherein the union had represented the complainant at the earlier stages in the process. The Board, assumed without deciding that the duty of fair representation extended to such instances and dismissed this aspect of the complaint on the basis that the union's conduct was not arbitrary, discriminatory or in bad faith. In *James Richard Hughes*, [1986] OLRB Rep. Jan. 103, the Board commented that "it is not at all clear that the duty would extend to ESB [Employment Standard Branch] meetings" (at paragraph 26) but did not have to resolve that issue in dismissing the complaint. The decision in *Betty Lavoie*, *supra*, wherein the Board refused to apply the section 68 duty to the context of civil proceedings merits further comment. In the Board's view, the union had neither the right nor the obligation to represent or fund an employee in collateral civil proceedings related to the termination of the complainant's employment:

13. It was suggested in particular, that the union should provide the funds, and absorb the costs, if the grievor commences a civil action in the Courts against her former employer. There are several difficulties with this proposition. In the first place, as we have already noted, there is no evidence that this suggestion was ever made to the union, and it is a little difficult to find that the union has broken the law by refusing to volunteer. More fundamentally, a civil action involves the assertion of common law rights which are personal to the grievor, and entirely remote from the sphere of collective bargaining in which the union operates and to which section 60 was intended to apply. Within the collective bargaining realm, the trade union is, by statute, the employee's exclusive bargaining agent, and an employee is unable to bargain on his own behalf or even act unilaterally to assert his rights under a collective agreement. In this context, it is easy to understand why the Legislature would impose upon the union a statutory obligation to act fairly. But the trade union has no right to bring a civil action on behalf of an employee, and

could not be a party to that proceeding. A civil action has nothing to do with the employee's collective bargaining rights either directly or indirectly. Since a common law Court (unlike an arbitrator) cannot order the employee reinstated, the grievor's connection with her employer, the bargaining unit, and her union has now been permanently severed. Her sole remedy is in terms of damages *if* she is able to prove, contrary to her employer's assertion, that her absenteeism did not justify her termination. It is one thing to assert that a union must act fairly within the context of collective bargaining; it is quite another to suggest that the union has an obligation in respect of the personal, civil or common law rights of a former bargaining unit employee. We do not think that section 60 was ever intended to extend that far or that the union could be breaching its obligation as bargaining agent by failing to fund a collateral civil action.

See also: *Registered Psychiatric Nurses' Association of British Columbia, supra*, wherein the B.C. Board, in part, held that the union was not required to represent bargaining unit employees at proceedings such as inquests which are outside the realm of the administration of collective agreements.

20. The Board regards the analysis in *Betty Lavoie, supra*, as applicable to other matters outside the reach of the union's statutory exclusivity as bargaining agent, such as the instant case involving representation at WCB and the WCAT proceedings. Delimiting the scope of the duty of fair representation to areas encompassed by the negotiation and administration of the collective agreement is grounded on the historical context in which the duty arose and the purpose and context of the duty as expressed in the Board's jurisprudence. The development of the American case law since *Vaca v. Sipes, supra*, indicates the thrust of the cases is to confine the duty of fair representation to the arena of collective bargaining and collective agreement administration. The Board case law, while not expressly imposing such a limitation, implicitly acknowledges those parameters as well.

21. The issue of the ambit of the union's obligation under section 68 is squarely raised in the instant case. The Board concludes, for the reasons already expressed, that the duty of fair representation must be commensurate with the reach of the union's statutory authority to represent the employees in the bargaining unit. Although, in a sense, the WCB intimately affects the relationship of employer and employee, the relevant statute, the *Workers' Compensation Act*, R.S.O. 1980, c. 539 (as am) effectively removes the adjustment of compensation for work-related injuries from the collective agreement arena by interposing an administrative agency between the worker and the employer. All claims for compensation are to be heard and determined by the WCB and, once compensation is awarded, it is paid out of an accident fund in accordance with a pre-determined scale. The trade union has no statutory role in the scheme. Hence, the union's representational duty in section 68 of the *Labour Relations Act* as exclusive bargaining agent is unrelated to the statutory scheme for workers' compensation and cannot apply to such claims: see *Eason v. Frontier Airlines, supra*, to the same effect. Accordingly, the Board finds that the union's decision not to represent the complainant at the WCAT proceeding falls outside the scope of the section 68 duty. Its decision in that regard may not be scrutinized by the Board by virtue of the duty of fair representation.

22. The fact that the WCB process has an "employment" aspect is insufficient to clothe the Board with jurisdiction under section 68. This conclusion echoes the reasoning in *Sylvia Colalillo, supra*, at paragraph 4 of that decision (set out at paragraph 18 above). The B.C. Board's comment in *Registered Psychiatric Nurses' Association, supra*, at 459 is particularly apposite in this regard:

The next branch of Morgan's complaint is the Union's failure to represent him at the coroner's inquest. The Association has argued that they were under no further duty to Morgan at this point in time since he had resigned and was no longer a member of the bargaining unit. We cannot accept this proposition. Had Morgan been discharged and a grievance sustained on arbitration, reinstatement would have restored his bargaining unit status at the time of the inquest.

Similarly, had the Association's representation of him before or throughout the Hall incident been in breach of Section 7(1), and a subsequent arbitration resulted in Morgan's reinstatement, the same result would have occurred. Notwithstanding this, however, we are of the opinion that the Association had no obligation under the Code to represent Morgan at the inquest.

The inquest was not a proceeding under the collective agreement; it was an outside proceeding. Where Section 7(1) speaks to "representation", it must be taken to mean representation in the negotiation or administration of collective agreements. Disciplinary matters and grievances come within the purview of the duty. Inquests do not. It is not enough that the outcome of the inquest might influence Morgan's employment rights. The same could be said of criminal charges, theft from an employer for example. While Section 7(1) would require fair representation of an employee discharged as a result of such a theft, it would not require the union to represent him in criminal court. A union may choose to provide representation to its member at outside proceedings such as inquests or criminal proceedings arising out of incidents during strikes, but their failure to do so is not a matter which may be a breach of the duty of fair representation.

23. Given the Board's finding that the instant complaint falls outside the ambit of section 68, the complaint cannot be said to disclose a *prima facie* case for breach of section 68: *Angelo Moro, supra*; *Ken Johnson*, [1986] OLRB Rep. Jan. 113; *Ronald Lewzoniuk, supra*. The objection of the respondent on this ground is upheld as well. Quite simply, the union had no obligation, pursuant to section 68, to represent the complainant at the WCB level or thereafter. The commencement of other legal proceedings seeking to challenge the WCB disclosure of the medical records on the grounds that such disclosure violated the complainant's *Charter* rights likewise falls outside the scope of the duty of fair representation. Indeed, to the extent those legal proceedings are to be initiated in the courts, the reasoning in *Betty Lavoie, supra*, is directly applicable: see, too, *Ronald Lewzoniuk, supra*. Consequently, this aspect of the complaint fails to disclose a *prima facie* for breach of section 68.

24. The Board's conclusion is not affected by the fact that the union initially represented the complainant before the WCB. That is, representation which arises outside the union's role as exclusive bargaining agent cannot generate a duty to represent pursuant to the *Labour Relations Act*. It may be that, in another forum, the union or its officers could be compelled to continue representing the complainant (or to have initially represented him at the WCB if they had declined to do so) based on the contractual relationship between a union and its members as expressed in its constitution or arising out of its conduct: see, for example, *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273; *Astgen v. Smith*, [1969] 1 O.R. 129; *Foran v. Kottmeier*, [1973] 3 O.R. 102 (C.A.); and see paragraph 18 above. Whether or not an enforceable right may be established elsewhere, it is clear the union's conduct in representing the complainant at the WCB stage cannot subject a decision not to do so at the WCAT level to review by the Board by virtue of section 68 of the *Labour Relations Act* as such an obligation would not be coextensive with the union's exclusive bargaining authority conferred by the *Labour Relations Act* and to which section 68 scrutiny must be limited. In other words, without statutory or inherent jurisdiction to review the contractual relationship between a union and its members, as expressed in the union's constitution and bylaws, the Board cannot enforce that relationship. Nor can the Board rely on a doctrine akin to estoppel to require the union to continue its representation as a matter of equity because of the union's conduct in initially representing the complainant, when the Board lacks the jurisdiction to supervise the relationship between the union and its members beyond the confines of the collective agreement, its negotiation and administration: see *Registered Psychiatric Nurses' Association, supra*, in the passage cited in paragraph 22 above.

25. Having regard to the foregoing, the Board upholds the respondent's preliminary objections that the Board does not have the jurisdiction to hear this complaint because the representa-

tion involved falls outside the scope of section 68 and that, accordingly, the complaint does not disclose a *prima facie* case.

26. For the foregoing reasons, the complaint is hereby dismissed.

2867-87-R Retail, Wholesale & Department Store Union Local 414, Applicant v. New Dominion Stores, The Great Atlantic & Pacific Company of Canada Limited, Respondent v. United Food and Commercial Workers International Union, Locals 175 and 633, Intervener

Sale of a Business - A&P buying Dominion through corporate vehicle New Dominion Stores Inc. - Unprofitable Dominion store in mall closed - NDSI corporately merged into A&P - A&P store opening in newly built part of mall 22 months later - Whether a sale at the time of the amalgamation or when store converted - Assumed that amalgamation constituted a sale - Board finding that A&P store in expanded mall was not a continuation of any part of the Dominion store but only an expansion of A&P's existing business - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *E. G. Theobald*.

APPEARANCES: *Paul Cavalluzzo* and *James Hayes* for the applicant; *Charles R. Robertson*, *C. W. Fraleigh* and *D. M. Stevens* for the respondent; *Harold F. Caley* for the intervener.

DECISION OF THE BOARD; May 25, 1989

1. This is another application pursuant to section 63 of the *Labour Relations Act* which has arisen because of the purchase of numerous Dominion stores by the respondent, The Great Atlantic & Pacific Company of Canada Limited (hereinafter "A. & P."). In this regard, see *New Dominion Stores Inc.* [1986] OLRB Rep. Apr. 519, and [1986] OLRB Rep. Oct. 1378. The applicant (hereinafter "R.W.D.S.U.") brings this application asserting that there has been a sale of a business within the meaning of section 63(2) of the Act between New Dominion Stores Inc. (hereinafter "N.D.S.I.") to A. & P., involving the conversion to an A. & P. store of the former Dominion store at the subject location. The intervener (hereinafter "U.F.C.W.") represented employees of A. & P. before the purchase of Dominion and currently represents the employees at the subject store.

2. The relevant portions of section 63 read as follows:

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been

a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

The parties did not rely upon the provisions of section 63(4) or (6) of the Act.

3. The store in question was originally opened by Dominion as a Dominion store in the Elgin Street Mall in St. Thomas, Ontario, in October, 1975. On April 29, 1985, A. & P. bought Dominion, including this store and approximately 91 other Dominion stores, through the creation of a corporate vehicle, N.D.S.I. It is agreed that N.D.S.I. is the successor employer, for purposes of section 63 of the Act, with respect to this purchase. The employer (whether N.D.S.I. or A. & P.) has subsequently negotiated and signed two successive collective agreements with each of R.W.D.S.U. and U.F.C.W. Although A. & P. did not want to purchase this specific store, store #986, the sale from Dominion included numerous "undesirable" stores as part of the overall package, and store #986 was one such "undesirable" store. A. & P. was required to purchase as part of the price for obtaining profitable stores. The applicant R.W.D.S.U. represented employees at #986 both before and after this sale.

4. As of the time of the sale, store #986 was decidedly unprofitable. It was losing approximately ten cents for every dollar of sales, and the losses from operating the store were substantially greater than the rental payments under the lease. The lease conditions not only precluded expansion of the store but gave the landlord the right to build in the vacant areas surrounding the store and thereby bury the store within the Mall. Had the landlord exercised this right, store #986 would have been left with no direct access to outside, and no nearby parking for its patrons. Ready parking availability is a critical factor for the success of a supermarket style retail food outlet. In short, the store was losing substantial amounts of money, with no realistic likelihood of rendering it profitable.

5. The lease with the landlord contained a "covenant to operate", requiring A. & P. to continue to operate the store as a retail food supermarket, regardless of its profitability. Nevertheless A. & P. (through N.D.S.I.) began to look at closing down the store permanently. In early fall, 1985, the landlord was made aware of A. & P.'s plans to close the store. In late September, 1985, the landlord's lawyers wrote to A. & P. advising it that the landlord would take legal action if necessary, to compel A. & P. to honour the lease and continue to operate the store.

6. During the fall of 1985, A. & P. made serious efforts to sublease the store premises, approaching some of its retail food competitors and other companies not in the retail food industry. These efforts proved unsuccessful, largely because of the dim view held by prospective subtenants of the likely profitability of a retail store in the mall location. A. & P. also tried unsuccessfully to negotiate a termination of the lease with the landlord. On February 4, 1986, the landlord commenced legal action against A. & P., seeking a mandatory injunction to compel it to continue operating the store, and damages.

7. On February 8, 1986, the store was closed, and shortly thereafter the Dominion signs were taken down and it was stripped of its equipment and other assets. A. & P. continued to pay rent to the landlord. No retail food store was ever reopened at the same location in the mall.

8. Approximately two weeks later, on February 23, 1986, a corporate reorganization occurred in which N.D.S.I., along with other corporate entities, was amalgamated into A. & P. The effect of this amalgamation was that N.D.S.I. merged or collapsed into its parent A. & P. All

the businesses and assets of N.D.S.I., including the recently closed store at the Elgin Street mall, were merged into A. & P. by means of this amalgamation.

9. After this transaction, store #986 remained closed. A. & P.'s corporate parent is an American company based in New Jersey, and New Jersey headquarters put pressure on A. & P. to convert the lost rent into productive profits. As a result, A. & P. gave some thought to reopening the store, and there were discussions amongst senior management personnel about this option. In the end however, the company never reopened the store.

10. In the late fall of 1986, A. & P. learned that the mall owner planned to expand and alter the composition of the mall. The landlord hoped to add approximately one hundred thousand square feet to the mall and to secure Sears as a new tenant. The plan was to obtain co-anchors for the expanded mall, with a new Sears store at one end and a new retail food outlet at the other. Unlike the current mall with its dismal potential, A. & P. considered a retail food store in such an expanded mall, with Sears as co-anchor, to be an attractive business proposition. A. & P. concluded that an A. & P. store, rather than a Dominion store, in the newly built location in the mall would prove beneficial for several reasons. For years A. & P. had operated a successful A. & P. store in downtown St. Thomas, but that store was overburdened, and could not be further expanded. By opening an A. & P. store in the expanded mall, A. & P. would be able to relieve some pressure on its downtown store, increase its overall market presence in the St. Thomas area, and maintain its profitability within that area.

11. The lease for store #986, which had been a liability from the time of A. & P.'s purchase of the Dominion stores in April 1985, and particularly since the store had been closed in February of 1986, suddenly became a valuable asset. Although the lease preserved the landlord's right to build or expand in areas surrounding the dormant store, the lease gave A. & P. the right to preclude any construction in or upon store #986 premises. The expansion plans involved serious encroachment upon these leased premises. The parties' roles reversed. The landlord now needed a surrender of the lease for store #986 in order to proceed, and it therefore took action to terminate the lease on the grounds of A. & P.'s breach of the covenant to operate. In turn, A. & P. quickly moved to assert an active interest in the lease location. A. & P. advised the landlord that it intended to reopen a retail food store in the premises it had closed on February 8, 1986. The effect of such notice was to nullify the landlord's right to unilaterally terminate the lease. There is no question however, that A. & P. did not have any real intention or commitment to reopen the store that it had previously closed. It only advised the landlord of its intention to do so in order to force the landlord to negotiate with it as the likely tenant for the new supermarket. From the landlord's perspective, if A. & P. did reopen in the closed premises, as was its right, it could prevent a substantial portion of the proposed expansion. A. & P. used the lease as a lever, both to ensure that an A. & P. store would be the retail food store in the expanded mall and to obtain lease concessions, such as rents lower than fair market value. At the same time, A. & P. was prepared to pay fair market value rent for the new supermarket if necessary.

12. Further to its goal of opening a new A. & P. store in the expanded mall, in early March, 1987 A. & P. performed a comprehensive study on the new location, its marketability, likely profitability, potential trading areas and so on. Head office had to authorize the new store, so on March 10, 1987, a request was made to New Jersey headquarters for its approval to open an A. & P. store in the new location in the mall. As part of its sales pitch to headquarters, A. & P. indicated it had considered several options, including the possibility of reopening the store in its former location, but had nevertheless concluded that opening a new store was preferable.

13. On April 3, 1987, headquarters officially approved the plan to open the new store, with

certain conditions attached, and authorized the expenditure of approximately one million four hundred thousand dollars in the construction and refitting of the new store.

14. The lease for the former Dominion store was surrendered on April 30, 1987, and the new store opened in a newly built part of the mall on December 8, 1987, outfitted entirely with new equipment and stock, none of which had been transferred from the former Dominion store #986. As A. & P.'s projections had suggested, approximately one hundred thousand dollars per week of business for the new store was redirected from A. & P.'s store downtown. As well, since the mall was now improved because of its greater number and variety of stores and because Sears was a particularly attractive new tenant, customers for the new A. & P. were drawn from a much wider geographical area than they had been for the former Dominion store. Many of the employees in the new store were transferred from the downtown A. & P. store, and from other A. & P. stores across the province, where they were all represented by U.F.C.W.

15. Based on these facts, R.W.D.S.U. asserts that a sale occurred either at the time of the February 23, 1986, amalgamation of N.D.S.I. into A. & P., or in the alternative, when the store was converted from a Dominion to an A. & P. store, regardless of any change in the legal identity of the employer.

16. In order for a sale or transfer within the meaning of section 63 of the Act to occur, there must be a change in the ownership of the business or part of the business. The identity of the employer must change through the transaction. Section 63(2) deals with situations where one employer sells or transfers his business to another employer. Where the same employer (in the sense that the legal entity that is the employer has not changed) deals with its assets in a fashion which does not involve transferring the legal ownership of those assets or business to another employer, section 63 does not apply. See in this respect, for example, *Valencia Foods* [1984] OLRB Rep. May 773.

17. Had A. & P. been the owner/employer throughout, and decided to close the Dominion store and convert it into an A. & P. store, section 63 would therefore be inapplicable. A. & P. would have been the legal entity that was the employer both before and after the store conversion. The mere change in name or nature of one of its stores would not trigger the provisions of section 63. The two prior decisions set out in paragraph 1 above might arguably be read as treating a store conversion itself as giving the Board jurisdiction under section 63. However, the first decision does not directly consider this issue and in any event appears to treat the "sale" as being the corporate amalgamation of February 23, 1986, rather than the conversion of the store. In the second decision, the parties had agreed the conversion was a "sale", and it was therefore unnecessary for the Board to decide the issue. The only transaction before us that involved a change in the legal ownership or the identity of the employer was the amalgamation of February 23, 1986. If this transaction is not a "sale", then the application must be dismissed. In this regard, the respondent asserts that an amalgamation of the nature that occurred on that date cannot as a matter of law be a transfer or sale within the meaning of section 63 of the Act. The respondent further asserts that even if such a transaction could fall within the parameters of section 63, on the facts at hand it did not.

18. We need not decide these matters, as for purposes of our decision we have assumed that the amalgamation of N.D.S.I. and other companies into A. & P., as of February 23, 1986, constituted a sale of a business within the meaning of the Act. A. & P. became the new owner of all that N.D.S.I. owned, including the demised premises at the mall. But even if (on our assumption) the corporate amalgamation constituted a sale, it does not necessarily follow that the closing of store #986 by N.D.S.I. and the opening of an A. & P. store by A. & P. in a new location within the same mall, approximately 22 months later, constituted a "sale" within the meaning of section 63.

19. Although the overall amalgamation is (assumed to be) a “sale”, not every component or element that was amalgamated will be a business or part of a business. Only if we conclude that a business or part of a business was transferred when the new store opened would a section 63 declaration issue. We must therefore ask whether the N.D.S.I. transfer to A. & P. with respect to store #986 was merely the transfer of an asset or collection of assets, or whether it constituted a transfer of a business or part of a business. This question must be decided upon the facts. We might usefully refer to *Miracle Food Mart, Steinberg Inc.* [1988] OLRB Rep. July 679 in this regard:

20. In dealing with section 63 applications, the Board has traditionally accorded a liberal meaning to both the term “business” and “sells”. The Board has recognized section 63 is intended to provide some stability and permanence to collective bargaining rights, to insulate those rights from the vagaries of commercial transactions where the enterprise continues, at least in part. Whether a particular commercial transaction constitutes the “sale” of a “business” or “part of a business” is a factual determination reflecting the totality of the specific circumstances. Various indicia have been noted in the jurisprudence including, the nature of the work, location, physical assets, managerial expertise, goodwill, company name, customer lists, accounts receivable, inventory, restrictive covenants, and hiatus in the operation. Moreover, it has been acknowledged that particular configurations of factors leading to a conclusion that a “sale” has occurred may differ considerably from industry to industry or between sectors of the economy. In any specific instance, the Board must determine whether what has been transferred is merely a collection of assets or an ongoing enterprise (or, at least, a distinct and severable segment of that ongoing enterprise). Those themes are expanded in numerous decisions and need not be elaborated on further: *Vaunclair Meats Limited, supra*; *Antonacci Clothes Inc., supra*; *Shiffer-Hillman Clothes, supra*; *Denis Moran Limited, supra*; *Clean & Brite Laundry, supra*; *Gordons Markets a Division of Zehrmart, supra*; *Queensway Foods Ltd., supra*; *Valencia Foods, supra*.

21. Within the retail food industry, the jurisprudence has generally stressed location as a critical factor, virtually equating that location with goodwill and patronage: *Dutch Boy Food Markets, supra*; *Provincial Fruit Company (Ottawa) Limited, supra*; *Leader's Clover Farms Food Market, supra*; *Canada Safeway Limited, supra*; *More Groceteria Limited, supra*. The premise that customers will continue, through habit, to patronize the same retail food location notwithstanding a change in ownership is not inviolate. Thus, when the “goodwill” was dissipated due to a lengthy hiatus between the closing of one operation and the reopening of another, a sale has not been found: *Gilham Foods, supra*, *Zehrs Markets Limited, supra*; *I.G.A., supra*. Likewise, where the new operation targeted a specific ethnic community, the “location equals patronage” analysis has been rejected and the Board concluded there was no sale within the meaning of the Act: *Keele-Wilson Supermarket Limited, supra*; *Super Tops Holdings Inc., supra*; *Queensway Foods Ltd., supra*; *Valencia Foods, supra*. Yet another circumstance wherein the concept of location as encompassing patronage is not applicable occurs when the vendor may be said to remain in competition with the purchaser in the same market area. This aspect, while not necessarily articulated as such, was implicit in *Dutch Boy Foods Markets, supra* and *Leader's Clover Farms Food Market, supra* and expressly noted in *Sunnybrook Food Market, supra* and *Dominion Stores Limited, supra*.

22. It is not suggested that the cases noted above turn exclusively or even primarily upon the presence or absence of one particular factor. Rather, in each instance, the Board determines whether there has been a continuation of the predecessor's business wherein the successor operation drew its life from the predecessor (to paraphrase *Gordons Markets a Division of Zehrmart, supra*) or, conversely, the establishment of a parallel business of a similar nature, in particular, an expansion of a pre-existing business: *Valencia Foods, supra*; *Queensway Foods Ltd., supra*.

20. There is no question that when the Dominion store was closed in February, 1986, A. & P. (through N.D.S.I.) made a decision to close the store permanently. That decision was taken for sound business reasons, as N.D.S.I. was unable to see any mechanism for making the store profitable and the payment of the dead rent was less unprofitable than the actual operation of the store.

The store remained closed for approximately twenty-two months. Although some discussions were pursued about the possibility of reopening it, those discussions do not support a conclusion that A. & P., the new employer as of February 23, 1986, ever decided to reopen store #986, either as a Dominion or an A. & P. To the contrary, when it learned that the landlord was going to expand and significantly upgrade the mall, A. & P. became interested in expanding its pre-existing A. & P. business by means of opening a new A. & P. store in the new mall.

21. The fact that both the former Dominion store and the new A. & P. store were both found in the same mall does not detract from the fact that the former Dominion store, as a business, had been permanently closed. All that remained after the closure of that store was the lease itself. Notwithstanding the covenant to operate contained in the lease, the old store remained closed, stripped, and dormant, and A. & P. did not change that status. As such, the lease was not part of a business but only an asset. A. & P. subsequently used that asset as a lever to secure both the right to move into the new location in the developed mall, and the ability to negotiate favourable terms for a new lease. The lease was a lever not because of any ongoing or inchoate business it represented, but because it enabled A. & P. to block the landlord's plans. A. & P. was prepared to pay fair market value if necessary, the Dominion store had been closed for 22 months, and no goods, equipment or employees from store #986 transferred to the new store. The premises were newly built and the mall itself had been transformed. Advising the landlord that the old store would reopen did not evidence a real intention to resurrect an unprofitable business at the demised location, only an intention to preclude the landlord from terminating the lease and thereby depriving A. & P. of its ability to force the landlord to negotiate with it over occupancy of the new store.

22. The fact that many of the customers for the new A. & P. store would or might have been customers of the former Dominion store does not mean that the Dominion store "business" was transferred in any respect to the new A. & P. location. Supermarket customers will often shop at the nearest and most convenient retail food outlet, provided services are relatively comparable among stores. But this reality of the retail food trade does not mean that the business itself has continued or been transferred to the new location. It means only that the new business has a built-in trading area or base from which to attract customers to its new store. Location is not determinative, it is only one of the factors. Similarly, hiatus between closure and opening is not determinative, but only one factor. The fact that the hiatus between the closure of Dominion store #986 and the opening of the A. & P. store was quite long, twenty-two months, does not itself mean that the business of the former has not been transferred to the successor. There is no temporal bright line beyond which bargaining rights will not transfer. If all the circumstances yield a conclusion that a business, or part thereof, has been transferred, then the appropriate declaration will issue, whether the interval be 12 months or 22 months.

23. In summary, we are satisfied that the A. & P. store in the expanded mall is not a continuation of any part of the business of store #986, but rather an expansion of A. & P.'s preexisting business. Given this finding, for the reasons expressed, this application is dismissed.

2018-88-U United Steelworkers of America, Applicant v. Plaza Fibreglas Manufacturing Limited and Plaza Electro-Plating Ltd. and Citron Automotive Industries and Sabina Citron, Respondents

Adjournment - Evidence - Witness - Principal of respondent refusing to produce employment forms without covering over personal information - No lawful excuse for refusing to produce the documents as ordered by the Board - Board stating case to Divisional Court - Court ordering Board to give witness another opportunity to produce - Board scheduling another hearing at which adjournment request by respondent denied - Witness continuing to refuse production - Matter adjourned

BEFORE: *Patricia Hughes*, Vice-Chair.

APPEARANCES: *L. A. Richmond*, *M. Crnkovich* and *J. Perquin* for the applicant; *Mary Eberts* for the respondents.

DECISION OF THE BOARD; April 26, 1989

1. On November 24, 1988, the United Steelworkers of America ("the union") filed an application under section 93 of the *Labour Relations Act* ("the Act") alleging that Plaza Fibreglas Manufacturing Limited ("Plaza Fibreglas"), Plaza Electro-Plating Ltd., Citron Automotive Industries (both together with Plaza Fibreglas "the companies") and Sabina Citron had unlawfully locked-out the employees of Plaza Fibreglas. The first few days of hearing into that application (before me sitting alone) were devoted to preliminary objections and the production of documents.

2. Mrs. Citron, the principal of the companies, as well as an individually named respondent, undertook to produce certain documents which had been the subject of a summons *duces tecum* by the union. Subsequently, however, she stated she would not produce application forms for "Citcor Manufacturing Ltd." ("Citcor") (which Mrs. Citron testified was the entity which had been referred to in the application as "Citron Automotive Industries"), without covering over the addresses, telephone numbers and social insurance numbers of the persons making the applications. I was persuaded that the union was entitled to determine who had made application at Citcor and required the covered information on the documents to establish the identity of the persons concerned because of the number of persons bearing the same names; furthermore, I ruled it was entitled to satisfy itself that there were no other marks on the application forms which might be relevant to the hiring at Citcor. Mrs. Citron nevertheless refused to produce the complete documents because, she said, she had been told by employees that the union had threatened them. I ruled that that reason was irrelevant to her obligation to produce the documents. Even if the threats which Mrs. Citron claimed underlay her refusal to produce had in fact occurred, they would not, in my view, constitute a lawful excuse to refuse to produce the documents as ordered. Therefore, I did not hear evidence about the alleged threats.

3. The union requested that I state a case under section 13 of the *Statutory Powers Procedure Act* ("the SPPA"). After two further refusals by Mrs. Citron to produce the documents, I read aloud section 13 of the SPPA, heard and considered submissions with respect to my exercising my discretion to state a case under that provision (among other arguments, counsel for Mrs. Citron contended that the employees' privacy rights outweighed the union's need to have the information disclosed), and stated a case which could be brought before the Divisional Court on application by the union. (See the Board's decision dated December 16, 1988).

4. Subsequently, a three person panel of the Board (including the writer) directed that the

merits of the section 93 application be heard together with a complaint which had been filed by the union under section 89 of the Act against the companies and Mrs. Citron (Board File No. 2019-88-U).

5. The stated case came on before the Divisional Court on March 31, 1989, giving rise to the following endorsement by the Court:

Application is adjourned sine die. We are of the view that Mrs. Citron refused to produce the documents herein without lawful excuse. We note that the Board has broad powers to compel evidence and it would only be in very exceptional circumstances that a witness could refuse to answer relevant questions or produce relevant documents. This is not one of these exceptional cases. It has not been shown to us that this precise issue has come to this Court previously under section 13 (of the SPPA). We think it would be unjust to proceed further with this inquiry at this time without affording the respondent Mrs. Citron another opportunity to produce the requested information.

Accordingly we direct the Board to give her another opportunity in view of this ruling to produce that information and we adjourn this hearing sine die.

6. Since the section 92 application and the section 89 complaint were in the process of being heard by the Board, the Board scheduled a separate hearing for April 25, 1989 before me sitting alone to give Mrs. Citron a further opportunity to produce the documents. At the outset of the hearing, counsel for Mrs. Citron (who had not appeared in the previous proceedings) requested an adjournment. After hearing the submissions of both counsel, I recessed and upon reconvening, gave the following oral decision:

Counsel for the respondent has requested an adjournment of this matter. This hearing date was fixed to comply with the direction of the Divisional Court to the Board in its endorsement of March 31, 1989 to give Mrs. Sabina Citron a further opportunity to produce in their entirety documents which she had refused to so produce despite direction of the Board to do so. Counsel advised that leave to appeal the Divisional Court's decision of March 31 is to be sought and accordingly, Mrs. Citron should not be put in the position of refusing to comply with a direction she is appealing. Counsel for the applicant has opposed the request.

The state of the matter is this: the Board has directed Mrs. Citron to produce the documents in their entirety; she has refused to do so; on the request of the applicant, the Board has stated a case to the Divisional Court; that Court has found that Mrs. Citron had no lawful excuse to refuse to produce but rather than imposing penalty at that time, directed the Board to give her a further opportunity to produce and adjourned the matter - that is, the still outstanding issue of penalty - *sine die*. This hearing is in compliance with that direction.

It is the Board's normal practice to proceed with matters before it regardless of whether there is either an actual or anticipated application for judicial review: see, for example, *Arlington Crane Service Limited*, [1985] OLRB Rep. Nov. 1547; *C.P. Fisheries Ltd.*, [1986] OLRB Rep. Nov. 1503; *Chrysler Canada Ltd.*, [1975] OLRB Rep. Sept. 699. It is a practice approved by the Court of Appeal: *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183*, [1971] 3 O.R. 832. In each case, of course, the Board must look at the circumstances before it and determine

whether it is "advisable in the interests of justice" to adjourn any hearing (see Rule 82 of the Board's Rules of Practice). One of the consequences of refusing adjournments is that further steps are taken or parties become subject to penalties.

In this case, there is outstanding the matter before the Divisional Court; it remains incomplete and will remain incomplete - and cannot be completed - until the Board complies with the Court's direction. It is more appropriate in my view for the Board to take the step required of it by the Court's decision than to halt that process by granting an adjournment. If, as suggested by her counsel, Mrs. Citron will refuse to produce the documents, both the applicant and the respondents will be free to exercise their legal rights. An adjournment at this stage would, in my view, serve a greater injustice against the applicant than a refusal to adjourn would serve against Mrs. Citron, if, indeed, it can be considered an injustice, even in these circumstances, to give her a further -at minimum, fourth - opportunity to produce documents which she has been directed to produce. Mrs. Citron is not impeded in the exercise of her rights by being given the opportunity; a failure to observe the Court's direction - or to postpone its observance - would leave the applicant without the recourse envisioned by the Divisional Court's endorsement.

Therefore, the request for an adjournment is denied.

7. Mrs. Citron then took the witness stand and after confirming that what Mrs. Citron had been directed to produce were the application forms for Citcor without the addresses, telephone numbers and social insurance numbers covered over, I gave her a further opportunity, as directed by the Divisional Court, to produce the application forms in their entirety. Mrs. Citron once again refused to produce the documents in that form.

8. The purpose of the specially scheduled day of hearing having been completed, the Board adjourned the proceedings until the next regularly scheduled day of hearing into the section 93 application and the section 89 complaint.

[On May 1, 1989 the Divisional Court sentenced Mrs. Citron to a 30 day suspended jail sentence. The Court's decision is reported at [1989] OLRB Rep. May 528: Editor]

2436-87-R; 2505-87-U Sheet Metal Workers International Association, Local 30, Applicant/Complainant v. Rainscreen Metal Systems Incorporated, Respondent.

Certification Where Act Contravened - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Employer breaching Act by asking employees who had joined the union - Statements made at captive audience meeting breach of Act - Employer not meeting onus of demonstrating that it did not lay off employees because of the organizing campaign - Names of employees who were laid off contrary to the Act included on the list of employees - Certificates issuing - Unnecessary to determine s.8

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Elizabeth Mitchell* and *Jim Moffatt* for the applicant/complainant; *Karen J. Weinstein* and *John Bierma* for the respondent.

DECISION OF THE BOARD; May 10, 1989

1. The Board has two matters before it. Board File No. 2436-87-R is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act* by Sheet Metal Workers International Association, Local 30 ("Local 30") against Rainscreen Metal Systems Incorporated ("Rainscreen"). If necessary, Local 30 seeks relief under section 8 of the Act. Board File No. 2505-87-U is a complaint against Rainscreen under section 89 of the Act upon which Local 30 essentially relies to support its section 8 request.

2. This application for certification was filed on December 3, 1987 and has been before two panels of the Board. The following paragraphs of an earlier decision of the present panel sets out a brief history of the proceedings involving these files:

2. These matters and others initially came on for hearing on February 8, 1988, before another panel of the Board. An application under section 63 and subsection 1(4) of the Act was withdrawn at that time and the parties involved in that application withdrew from the proceeding. Although a petition had been filed, no one appeared on behalf of the objecting employees at the hearing on February 8, and the panel hearing this matter determined it would give no weight to the petition. Given these developments, the proceeding continued with only the Sheet Metal Workers International Association, Local 30 ("Local 30") as the applicant/complainant and Rainscreen Metal Systems Incorporated ("Rainscreen") as the respondent.

3. In its decision of February 16, 1988, the Board determined that the applicant is a trade union and an affiliated bargaining agent of a designated employee bargaining agency. The Board further found that the following bargaining unit constitutes a unit of employees of the Rainscreen appropriate for collective bargaining:

all journeymen and apprentice sheet metal workers in the employ of the respondent Rainscreen in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice sheet metal workers in the employ of the respondent Rainscreen in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

For purposes of clarity, the Board notes that employees working as sheeters, sheeters' assistants and material handlers are employees in the bargaining unit.

4. In its decision of February 16, 1988, the Board appointed a Labour Relations Officer to inquire into the list of employees in the bargaining unit and report back to the Board for the purpose of enabling the Board to determine whether eleven persons were employees of Rainscreen working in the bargaining unit on the application date. Pursuant to his appointment, the Board Officer met with the parties on May 24 and on June 3 and 7, 1988, and proceeded to examine ten persons. When the examination continued on June 8, 1988, the applicant called three witnesses and the respondent called one.

5. A copy of the Board Officer's Report (the "Report") was sent to each of the parties, together with a (Form 68) Notice of Report of Labour Relations Officer. Counsel for each party submitted written representations with respect to the conclusions the Board should reach in view of the Report and requested a hearing. On September 27 & 28, 1988, a hearing was conducted to entertain the representations of the parties regarding the Report. The parties were in agreement that it would be appropriate to resolve the issues raised in the Report before proceeding to address the remaining outstanding issues.

3. The present panel entertained the parties' submissions at a hearing on September 28, 1988 concerning the persons challenged by Local 30. In its decision of November 3, 1988, the Board determined that Local 30 succeeded in only one of its original six challenges. Since one of the matters raised in Local 30's section 89 complaint concerns the lay-off of two employees two days prior to the application date, the Board noted in its decision that the final resolution of the list of employees depended on the outcome of the section 89 complaint.

4. The hearing to determine the remaining outstanding issues required seven days over a four-month period. At the outset of the hearing, the Board announced the "count". It advised the parties that Local 30 had filed membership evidence on behalf of 10 employees, 8 of whose names corresponded with the sixteen employees on the employer's list of employees. The Board reiterated that the final resolution of the number of employees in the unit for purposes of the count, and accordingly, the final "count", had to await the outcome of Local 30's section 89 complaint.

5. The Board heard all of the evidence and submissions of the parties concerning Local 30's request to be certified pursuant to section 8 of the Act. This included, of course, the evidence and submissions of the parties concerning the allegations raised in Local 30's section 89 complaint. Rainscreen, who proceeded to call evidence first, and Local 30, each called six witnesses. In making its factual determinations, the Board has considered all of the oral and documentary evidence and the parties' submissions relating thereto. Since most of the witnesses called by each party gave evidence concerning the key events and given the extensive evidence called, the Board does not propose to set out all of the evidence of each witness. The Board notes that in assessing the evidence, it took account of the fact that much of the testimony of the witnesses concerned events which had occurred approximately a year prior to their testifying.

6. Rainscreen started operating in approximately October 1986. John Bierma owns 10% of the shares of Rainscreen and he is its general manager. Susan Keslick owns 90% of the shares of Rainscreen. Very generally, Rainscreen is in the business of installing windows and the exterior covering on buildings, such as aluminium siding. Until at least the time Local 30 filed its application for certification, Rainscreen obtained most of its work via subcontracts from Maxim Group General Contracting Limited ("Maxim"), a company engaged in exterior building repairs and maintenance. Charles Keslick, the husband of Susan Keslick, is the President of Maxim. As a result of a voluntary recognition agreement, Maxim has had a bargaining relationship since 1985 with The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union No. 172, Restoration Steeplejacks ("Local 172"). At the time of the application, Rainscreen was engaged in performing work at the Strathcona Hotel on a subcontract from Maxim. At this time, Rainscreen was also engaged in a small job at the Toronto Dominion Centre. With respect to the Strathcona job, Bierma was responsible for the day-to-day operation

of Rainscreen. S. Mueller, a working foreman for Maxim and a member of Local 172, played a role in supervising Rainscreen employees and was involved in co-ordinating the work between Maxim and Rainscreen employees. Rainscreen began the Strathcona job approximately in July 1987 and completed it in January 1988.

7. The focus of Local 30's section 89 complaint is on three relatively distinct aspects of Rainscreen's conduct or conduct on behalf of Rainscreen. They are as follows:

- (1) the events surrounding two meetings called by Rainscreen, one on November 10 and the other on November 11, 1987;
- (2) the lay-offs of D. Wells and J. Parsons by Rainscreen on December 1, 1987; and
- (3) the participation of Rainscreen in the origination and circulation of the petition.

The Board will deal with each of these areas in turn.

The Meetings of November 10 and 11, 1987

8. J. Moffatt, the President of Local 30 and an organizer, first became aware of Rainscreen's presence on the Strathcona site on November 5, 1987. He made contact with some of Rainscreen's employees which eventually led to a meeting between Moffatt and approximately ten of Rainscreen's employees in a bar at the Strathcona after work on November 9, 1987. Approximately seven employees who attended this meeting signed Local 30 membership cards. One of the employees who attended the meeting was D. Basawa. Basawa, who was not a supporter of Local 30, telephoned Bierma after the meeting and told him the number of employees who attended the meeting and the number, without mentioning any names, of those who signed cards. Basawa suggested that Bierma do something or Rainscreen would become unionized. During the early morning of November 10, 1987, Bierma called C. Keslick and asked him if he would address the Rainscreen employees that day about the union. In his evidence, C. Keslick indicated that it was his impression that Bierma thought the presence of the union might be a problem although C. Keslick was not of the same view. C. Keslick was unable to attend a meeting on that day and arranged for P. MacKendrick, a project manager with Maxim, to attend instead.

9. Bierma was at the Strathcona at approximately 7:20 a.m. on November 10, 1987. At that time, he met with the Rainscreen employees near the tool room located on one of the floors of the hotel. Bierma testified that he advised the employees that there would be a meeting later that afternoon and that he knew some employees joined the union at a meeting the previous evening. Bierma testified that he asked who joined the union and, upon receiving no response, he said "I'm going to find out anyway". Bierma denied asking the employees who signed cards to raise their hands. However, a number of employees testified concerning this event and the Board accepts their evidence to the effect that Bierma did ask the employees who joined the union to raise their hands. A number of those employees in attendance did raise their hands, including J. Parsons.

10. The Board finds that Rainscreen contravened sections 64 and 70 of the Act when Bierma asked employees on November 10, 1987 who joined the union. These provisions of the Act attempt to ensure that employees are able to decide whether they wish to join a trade union in the absence of improper employer influences. The Board has often noted that the relationship between an employer and its employees is a sensitive one. By acting the way he did during the morning of November 10, 1987, Bierma sent the message to Rainscreen's employees that the com-

pany knew of Local 30's campaign, that it is interested in knowing who joined and that it would find out who signed cards. Bierma's conduct constitutes interference and intimidation contrary to the *Labour Relations Act* since it was intended to impact on employee wishes with respect to joining or continuing to support Local 30.

11. A "captive" audience meeting was held at approximately 2:30 p.m. on November 10. MacKendrick addressed the Rainscreen employees about the subject of craft jurisdiction. The meeting lasted for approximately an hour with no one from Rainscreen management in attendance. Another "captive" audience meeting was held on November 11 at 9:30 a.m. to deal with the same subject matter. The principal speaker on this occasion was C. Keslick, while MacKendrick, Bierma and Mueller were in attendance. At both meetings, the subject of benefits was also discussed. Local 30 alleges that certain comments at both meetings either by Rainscreen management or persons acting on behalf of Rainscreen concerning craft jurisdiction contravened sections 64 and 70 of the Act. It also alleges that these provisions were breached when certain comments by the same persons were made about benefits. The Board will deal first with the allegation relating to benefits.

12. Local 30 alleges that Rainscreen employees were promised a benefit package at the meetings of November 10 and 11, 1988 and that such a promise constitutes an attempt on the part of Rainscreen to interfere with Local 30's rights under the Act. After reviewing all of the evidence concerning what was said by management at the meetings of November 10 and 11, 1988, the Board is satisfied that management did not do what Local 30 alleges in regard to benefits. The evidence discloses that Rainscreen has had a number of meetings with its employees since it began operating and some of them were attended by C. Keslick. These meetings dealt with a number of matters including safety issues. One of the subjects raised at most of the meetings held prior to Local 30's organizing campaign was that of benefits. During the early stages of its operation, all of the employees were paid on a subcontract basis. In other words, they were paid a certain amount without any deductions and without any benefits. At the earlier meetings, some employees raised the issue of benefits and a considerable amount of discussion occurred between management and employees on this subject. At a meeting in mid-September with employees, management announced that it would implement a standard benefit package, the details of which had not been finalized at that point. Any employee who wanted the benefits could obtain them by ending the subcontracting arrangement and going on the payroll. By the beginning of January 1988, Rainscreen required all employees to be on the payroll system and it provided benefits to everyone. At the meetings in November 1987, certain employees raised the issue of benefits, not management. Some employees at these meetings were recently hired and would have likely been unaware of what discussions had occurred previously concerning benefits. Management simply advised employees at the November meetings that benefits were on the way as discussed previously. The evidence in its totality does not reveal that Rainscreen promised employees at the November meetings, or at any time for that matter, that benefits would be provided in order to interfere with Local 30's rights or the rights of employees under the Act.

13. The comments relating to craft jurisdiction at both November 1987 meetings are another matter. Again, MacKendrick spoke at the first meeting while C. Keslick was the principal speaker at the second. Both testified that the purpose of the discussion was to ensure that the employees had the full picture and understood the concept of craft jurisdiction. Employees at both meetings were told that Local 30's jurisdiction involved the work of essentially siding and decking and that, if certified, Local 30 would ensure that its members only performed the work within its jurisdiction. Employees were also told that if their work was restricted in this regard, Rainscreen would not be as competitive as might otherwise be expected. The individuals speaking on behalf of Rainscreen did tell employees that the choice was theirs and that their joining Local 30 would not

be a problem. At the second meeting, C. Keslick suggested that they might consider other options, such as the Ironworkers.

14. The Board is satisfied that Rainscreen's purpose in holding the two meetings with employees in November 1987 went beyond merely conveying information on craft jurisdiction. The meetings were held as a result of Bierma discovering that Local 30 had succeeded in obtaining membership support from some of Rainscreen's employees. Rather than simply holding one meeting, Rainscreen held two meetings in which different persons conveyed to employees essentially the same information. Although we do not accept as accurate all of the evidence the employee witnesses gave concerning what the management representatives said in connection with craft jurisdiction at the November 1987 meetings, we are satisfied that the message management intended to communicate to its employees was that the amount of work available to employees would be reduced if Local 30 became their bargaining agent, which in turn might lead to lay-offs. As noted earlier, a portion of Rainscreen's work involved the installation of windows. The employees were told, in effect, that Local 30 would not permit them to install windows since its jurisdiction was limited to siding and decking. Although the employees were told that their joining Local 30 was not a problem, the comments made on behalf of Rainscreen in their totality could only lead employees to believe their job security was at some risk if they became members of Local 30. Accordingly, the Board finds that the comments made on behalf of Rainscreen at the November 1987 meetings concerning craft jurisdiction, including the suggestion that the employees consider the Ironworkers, constitute interference and intimidation contrary to sections 64 and 70 of the Act.

The Lay-Offs of D. Wells and J. Parsons

15. Section 89(5) is applicable to the allegations made by Local 30 relating to the lay-offs of Wells and Parsons. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board addressed the effect of the section 89(5) reversal of the onus of proof as follows:

Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

In assessing the reasons for an employer's conduct, the Board's task, in essence, is to examine all of the circumstances of a particular case in order to determine whether the true reasons for the treatment of individual employees is at least in part based on anti-union considerations. In carrying out the task in this case, the Board reviewed all of the evidence, but particularly the evidence of Bierma, Mueller, Wells, Parsons and Basawa. Some significant conflicts are contained in the evidence given by Bierma and Basawa. After utilizing the usual criteria in assessing the credibility of witnesses, including the fact that Basawa recently became a member of Local 30 and was referred to a good job, the Board prefers the evidence of Basawa to that given by Bierma where there is any significant conflict in their evidence. The Board is satisfied that Basawa truthfully testified about the relevant events. The fact that Basawa is now a member of Local 30 and successfully sought Moffat's assistance in finding a job and the fact that he was upset about the way in which his employment with Rainscreen had come to an end explains why Basawa was prepared to testify. Given all of the evidence, these factors do not lead us to conclude that Basawa lied in order to assist Local 30's certification effort or because of any ill feelings he had towards Rainscreen.

16. Wells and Parsons were both hired by Rainscreen in approximately mid-September, 1987. Both employees worked on swing stages installing siding. Depending on the amount of siding to install, Rainscreen had up to at least seven stages, each with two employees, operating at a

given time. Wells and Parsons were both laid off on December 1, 1987 by Mueller. Rainscreen's position is that the lay-offs of Wells and Parsons had nothing to do with Local 30's organizing efforts or the fact that these employees became members of Local 30, but rather the lay-offs occurred only because of a shortage of work and because the experience and capabilities of Wells and Parsons dictated that they were the most appropriate individuals to lay-off. Rainscreen sent Wells and Parsons letters in early January recalling them to work for January 6, 1988. Parsons did not receive his recall letter since it was not sent to his address, although it was sent to the address contained in Rainscreen's records. Upon receiving his recall notice, Wells decided not to contact Rainscreen since he did not want to work for the company anymore.

17. As noted earlier, Bierma was interested in discovering on November 10, 1987 who had signed cards for Local 30. At that early morning incident, Parsons had indicated by raising his hand that he joined Local 30. Basawa testified that after his call to Bierma to advise him of the first organizing meeting on November 9, 1987, he kept in almost nightly contact with Bierma to discuss business matters and to keep Bierma apprised of Local 30's progress. He also testified that during a discussion he had with Bierma during the evening of November 30, 1987, Bierma told him that Wells had signed a union card. Basawa made the comment that Local 30 must be close to securing sufficient support to apply for certification. According to Basawa, Bierma then told him that he was going to lay Wells off. In his evidence, Bierma denied that he had frequent discussions with Basawa concerning Local 30's organizing campaign and he denied having any conversation with him concerning laying-off Wells. In reviewing the evidence of Basawa and Bierma on these points, the Board prefers Basawa's evidence.

18. During the early part of the work day on December 1, 1987, Basawa mentioned to P. Dugal, a fellow employee, that Wells was "going down the road". Although Basawa asked Dugal not to say anything to anyone, Dugal spoke with Wells and told him he would be laid off that day because he signed a union card. After hearing this, Wells confronted Bierma about this rumour. Wells testified that Bierma, in Mueller's presence, told him that he was not going to be laid off and that he could not be laid off for signing a union card. Wells indicated that if he was to be laid off, he wanted some notice and he understood Bierma to say he would get two weeks' notice. Later in the day, Mueller told Wells that he was being laid off. When asked by Wells for a reason, Mueller said that that was the way it had to be. Mueller did not give Wells any indication as to how long the lay-off would last. In the late afternoon of December 1, Mueller advised Parsons that he was being laid off as well. Parsons testified that when he asked for a reason for the lay-off, Mueller simply shook his hands and said "that's it". Wells and Parsons both testified that no one had ever complained to them about their work or about their punctuality and attendance.

19. The essence of Rainscreen's position is that by the end of November, the company's access to electrical outlets was reduced from nine to five, which in turn reduced the number of swing stages it was able to operate. Although the job was behind schedule, the reduction in the electrical outlets meant that Rainscreen was overloaded with manpower. Mueller, the person who decided that Wells and Parsons would be the ones laid off, based his decision on their capabilities and work record in comparison with other employees, some of whom had been hired after Wells and Parsons. Bierma and Mueller both gave evidence concerning what occurred on December 1, 1987 and what the reasons were for the lay-offs. In the Board's view, there is a considerable amount of inconsistency in their evidence which cannot simply be attributed to the fact that they were testifying about events which had occurred a relatively long time ago.

20. Bierma testified that he was on his way to see Mueller to discuss the manpower requirements of the job when he was approached by Wells and had the discussion referred to earlier in Mueller's presence. After the discussion with Wells, Bierma had a discussion with Mueller. When

asked in examination-in-chief why Wells and Parsons were laid off, Bierma testified that they had finished their drop and there was nowhere else to put them. Bierma testified that Mueller told him that there was no place to put Parsons and Wells and that they would have to be laid off at the completion of the work day on December 3, 1987. Bierma testified that he told Mueller to inform Wells and Parsons that a glass job was coming up and that they would be called back when it was ready. Mueller testified that he spoke to Bierma about the lay-offs and then noticed Bierma having a discussion with Wells. He testified that he did not tell Bierma that Wells and Parsons would soon complete their drop since these employees did not work together on a swing stage. In his evidence, he said he indicated to Bierma that Wells and Parsons could work until the end of the work day on December 2, 1987. Mueller testified that Bierma told him that there was other work available for sheet metal workers at another location and that if Wells and Parsons had come to work on December 2, he would have advised them to go to Rainscreen's office. In his evidence, Mueller also said that he decided that Wells and Parsons should be laid off given their capabilities and because they had problems with lateness and missing days. He recalled speaking to Wells about these latter problems. Mueller was unable to give any specifics regarding their attendance record.

21. Even without regard to the evidence of Basawa, the Board finds that Rainscreen has not met its onus, as described in *The Barrie Examiner, supra*, of demonstrating that it did not, in part, lay off Wells and Parsons because of Local 30's organizing effort or because these employees supported Local 30. The inconsistencies in the evidence of Bierma and Mueller and the improbabilities of some aspects of their evidence concerning the lay-offs leads us to conclude that business considerations were not the only considerations that motivated their conduct towards Wells and Parsons. The evidence of these employer witnesses does not adequately provide an explanation for the lay-offs given their timing. But in addition to our view of Bierma's and Mueller's evidence attempting to justify the lay-offs, we have the evidence of Basawa, which we found to be credible, which establishes that Bierma told Basawa on November 30, 1987 that Wells had signed a membership card for Local 30, that he believed that Local 30 was close to obtaining enough support for certification and that, for these reasons, he was going to lay off Wells. The Board is satisfied that Rainscreen laid off Wells and Parsons because of their support for Local 30 and because Local 30 was close to obtaining the required membership support from Rainscreen's employees. On the evidence before it, the Board is satisfied that Rainscreen contravened sections 64, 66 and 70 of the *Labour Relations Act* when it laid off Wells and Parsons. We note that the only remedy that Local 30 requested for this contravention of the Act was an order directing Rainscreen to compensate Wells and Parsons for their losses from December 2, 1987 to January 6, 1988, the date of the recall.

The Petition

22. We do not propose to deal with Local 30's allegations regarding Rainscreen's involvement with the petition in great detail since Local 30 argued that these allegations were directed primarily to its request for section 8 relief. Bierma, S. Verge, a working foreman, and Basawa were the principal witnesses on this issue. Bierma and S. Verge testified that Bierma did not play any role in the origination of the petition while Basawa's evidence disclosed just the opposite. Again, the Board prefers the evidence of Basawa on this point. After Rainscreen received notice of Local 30's application, Bierma called Basawa and told him that he wanted him to circulate a paper in order to get employee signatures. The next day, Bierma met S. Verge and Basawa in the lobby of the Strathcona where Bierma provided Basawa with the wording for the preamble and asked him to copy it on a petition. Basawa wrote the heading on the petition using the exact wording provided by Bierma. At the hearing, S. Verge initially testified that he wrote the heading on the petition but upon seeing the petition, he admitted the writing was not his. Basawa and S. Verge both obtained signatures from employees on the petition during working hours. Bierma was quite happy

when Basawa advised him of the success he had obtained in getting employees to sign the petition. Bierma made arrangements for S. Verge to transport Basawa to the Board's offices for the purpose of filing the petition. The Board is satisfied that Rainscreen contravened section 64 of the Act when Bierma was involved in the petition activity to the extent described above.

23. As the Board noted at the outset, the final resolution of the list of employees and, the extent of the support of Local 30, had to await the Board's determination of the section 89 complaint as it related to the lay-offs of Wells and Parsons. Having determined that Wells and Parsons were laid off contrary to the Act, the Board finds that their names should be included on the list of employees. But for Rainscreen's illegal conduct, Wells and Parsons would have been at work on the application date. The list of employees then for the purposes of this application contain the names of eighteen employees. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 17, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. In these circumstances, it is unnecessary for the Board to determine whether Local 30 would be entitled to certification pursuant to section 8 of the Act.

24. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 8 of the Board's decision dated February 16, 1988 in respect of all journeymen and apprentice sheet metal workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

25. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all journeymen and apprentice sheet metal workers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

26. For purposes of clarity, the Board notes that employees working as sheeters, sheeters' assistants and material handlers are employees in the bargaining unit.

27. The Board has found Rainscreen to have contravened sections 64, 66 and 70 of the Act as previously indicated. Consequently, the Board orders:

- (a) that Rainscreen sign and post copies of the attached notice marked

“Appendix”, as supplied by the Board, in conspicuous places on its premises and active job sites and to keep such notices posted for fifteen (15) working days and to take all reasonable steps to ensure that the Notices are not altered or defaced or covered by any other material;

- (b) that Rainscreen provide reasonable access to a representative of the applicant to permit the applicant to satisfy itself that Rainscreen has complied with this posting order;
- (c) that Rainscreen give two representatives of the applicant an opportunity to hold a meeting, which will occur within two weeks of the receipt of this decision or a time satisfactory to the applicant, with all employees, without loss of pay, at a location to be agreed to by the applicant and the respondent. Should the parties fail to agree to a location for the meeting, the Board will select a location. The meeting may be as much as one hour in length. Rainscreen is further directed to require all employees to attend the meeting;
- (d) that Rainscreen compensate D. Wells and J. Parsons for their losses for the period of December 2, 1987 to January 6, 1988 arising out of their lay-offs contrary to sections 64, 66 and 70 of the Act.

28. The Board shall remain seized to resolve any dispute concerning compensation or the implementation of these orders.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF
A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU,
WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR
OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO
ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A
UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR
DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION
ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN
OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS
UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR
RELATIONS BOARD.

RAINSBEE METAL SYSTEMS INCORPORATED

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

3536-87-R; 0010-88-U; 0609-88-U; 0696-88-U United Food & Commercial Workers' International Union Local 175, AFL-CIO-CLC, Applicant v. **Royce Dupont Poultry Packers**, Respondent v. Group of Employees, Objectors; United Food and Commercial Workers International Union, Local 175, AFL-CIO-CLC, Complainant v. Royce Dupont Poultry Packers, Respondent

Certification Where Act Contravened - Evidence - Membership Evidence - Unfair Labour Practice - Evidence of witness who was not subject to full cross-examination admissible - Surreptitiously made tape-recording of a "captive" audience meeting of employees convened by an employer admissible in unfair labour practice complaint - Viva voce evidence permitted on membership cards missing dates - Threats and questioning of employees concerning the union breach of Act - Statements made at "captive" audience meeting breach of Act - Follow-up meeting not curing breaches - Discharge of employee after the union filed an unfair labour practice complaint on his behalf breach of Act - Union certified pursuant to s.8

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *H. Peacock* and *R. W. Pirrie*.

APPEARANCES: *Douglas J. Wray*, *Roberto Moreton* and *William Richardson* for the applicant; *Cheryl A. Edwards*, *Howard Ungerman* and *Irving Ungerman* for the respondent; *Lou Brzezinski*, *Marcie Weinman* and *Wayne Maracle* for Wayne Maracle.

DECISION OF THE BOARD; May 19, 1989, as amended May 26, 1989

1. This is an application for certification, in which the applicant relies upon the provisions of section 8 of the *Labour Relations Act*, and numerous complaints filed pursuant to section 89 of the *Labour Relations Act*, in which the applicant/complainant alleges that the employer has breached, amongst other sections, sections 64, 66, 70, 79, and 80 of the Act.
2. The Board heard the evidence of seventeen witnesses, over approximately twenty days of hearing, and in an oral decision delivered at the conclusion of the last hearing day, the Board found that numerous unfair labour practices had been committed by the respondent employer, and the Board directed that a certificate pursuant to section 8 of the Act issue forthwith. The Board reserved on all other aspects of remedial relief, and indicated that its complete findings and reasons would follow. We now provide those findings and reasons.
3. The proceeding also dealt with whether Wayne Maracle, an employee of the respondent Royce Dupont, exercised managerial functions within the meaning of section 1(3)(b) of the Act, and in any event, whether Maracle was acting on behalf of the employer when various alleged unfair labour practices were committed. There was also an issue as to the sufficiency of several membership cards submitted on behalf of the applicant, in that some cards were undated and one card did not indicate the local of the applicant. These concerns in turn raised an issue with respect to the sufficiency or propriety of the Form 9 Declaration in that the particular Form 9 noted no exceptions and failed to identify the cards in question.

I - The Evidence

4. Before setting out the facts, we would make several comments about the evidence received by the Board. Irving Ungerman, the President of the respondent company, was called as a witness by the respondent. His examination-in-chief was completed by respondent counsel, and counsel for Maracle completed his cross-examination. Union counsel's cross-examination had

reached the point at which Ungerman denied making a number of statements to a “captive” audience of employees. At that point, counsel for the union indicated that a tape-recording had been made of that captive audience meeting. Counsel for both the respondent and Maracle objected to the admissibility of the tape-recording. Submissions on the admissibility of the tape-recording were made the next hearing day and, as the hearing day was at an end, the Board reserved its decision and adjourned. After the Board issued a written decision that the tape recording could be played to Ungerman in cross-examination (which ruling we will return to later), and before the next hearing day, the respondent asked that Ungerman be excused from further cross-examination, at that stage in the hearing, due to ill health. After hearing evidence and submissions of the parties with respect to this request, the Board directed that Ungerman’s cross-examination cease for the moment and the hearing proceed in the interim. When the evidence was completed but for Ungerman’s continued cross-examination and redirect, the parties agreed that Ungerman was still not physically well enough to continue with his cross-examination. Accordingly, his testimony was never completed.

5. Although the parties were unable to agree on the weight the Board ought to afford to the testimony already given by Ungerman, they submitted that his testimony was admissible. Whether testimony of a witness not subject to full cross-examination is admissible or not is a discretionary matter for the Board. In this respect, see *Richmond Insulation Company* [1980] OLRB Rep. Oct. 1519; *Taunton Fabricating Ltd.*, Board File No. 1875-85-U, unreported, May 5, 1986; Sopinka and Lederman, *The Law of Evidence in Civil Cases*, 1974, pages 134 to 139; *Meyer v. Hall* (1972), 26 D.L.R. (3d) 309 (Alta.S.C.); *Randall v. Atkinson* (1899), 30 O.R. 342 (Ont.S.C.) and 30 O.R. 620 (Ont.Div.Ct.). Having regard to the parties’ submissions and the jurisprudence, the Board ruled that Ungerman’s testimony was admissible.

6. However, given his testimony, the other evidence led in the proceeding, and having regard to the usual indicia or factors in assessing credibility and weighing the evidence, we did not find Ungerman to be at all credible. Whether or not he intentionally attempted to mislead the Board, we are satisfied that his evidence ought to be afforded no weight, except in respect of those admissions or concessions not in his or the respondent’s interest or matters otherwise not in dispute.

7. We did not find Wayne Maracle to be a credible witness, and where the evidence of other witnesses conflicted with Maracle’s evidence, we have preferred and accepted the evidence of those other witnesses.

II - The Facts

8. Irving Ungerman has been the President and Chief Executive Officer, since 1945, of Royce Dupont, a poultry processing operation. Ungerman is also the owner or president of two companies involved in the same business, St. Clair Poultry Packers, which has existed for approximately twenty-five years, and Prime Poultry, which is a new plant set up by Ungerman and which commenced operations as of February 1, 1988. As Chief Executive Officer of the respondent Royce Dupont, Ungerman made all the essential decisions and effectively ran the entire business. It is fair to say that Ungerman was the business. Up until the applicant attempted to organize the employees at Royce Dupont, Ungerman treated his employees as if they were family. If needed, he arranged for low rental accommodation for them in houses he owned, he had not laid off or discharged an employee since Royce Dupont began, and he kept several employees on the payroll in part to take care of them, though they might not have been entirely satisfactory employees.

9. St. Clair and Royce Dupont had existed for many years, but in late 1987 Ungerman was starting a new business, Prime Poultry, and during the critical months of February and March of

1988, he was spending most of his time at the site of the Prime Poultry plant, getting it started and in running order. During this same time a sister local of the applicant was seeking to become certified at Prime. Although he was not physically present at the plant at Royce Dupont for much of this period, he continued to make all the essential decisions with respect to Royce Dupont and he played a pivotal role in the respondent's involvement with the union organizing campaign there.

10. The applicant had arranged for a union steward from a bargaining unit in an unrelated business to take a leave of absence from his job there, and go to work for Royce Dupont, and assist the organizing campaign at Royce Dupont. This organizer, Roberto Moretton, was hired as an employee by Royce Dupont sometime in January, 1988. His method of organizing consisted predominantly of discovering the names of fellow employees, and passing those names along to Don Dayman, a long time business representative of the applicant, and the individual with overall organizing responsibility for the Royce Dupont campaign. In turn Dayman would try and contact the employees, either together with Moretton or alone, and either at the employees' houses or other locations, usually a restaurant near the Royce Dupont plant.

11. Although Irving Ungerman testified that he was unaware of the union organizing campaign until he received the official Notice of Application for Certification from the Board (which notice was not mailed to Ungerman until March 31, 1988), there can be no doubt that Ungerman was fully aware of the campaign by some time in early March. His brother Karl, the vice-president of Royce Dupont and the most senior management individual on site at Royce Dupont when Irving was at the Prime Poultry location, testified that he knew of the union campaign around the 1st of March, 1988. Karl denied advising his brother Irving of the campaign, and testified that he had never even mentioned the union organizing campaign to Irving until Irving received the official Notice of Application for Certification from this Board. This testimony is simply not credible, given the evidence and in light of the events that occurred.

12. On March 15th, 1988, Irving Ungerman met with his bookkeeper, Margaret Pietro, and advised her that he wished to change the wages and benefits for all his employees, at all three of his plants, St. Clair, Prime, and Royce Dupont. As Pietro testified, this type of wholesale changing of benefits and conditions of employment was entirely within Irving's discretion. All employees were generally given raises in January and July of each year, and as well a specific employee might receive an additional raise whenever Ungerman felt like giving it. Wholesale changes and benefits of the type Ungerman discussed with Pietro had never before been directed by Ungerman for other than January or July. Ungerman asked Pietro to prepare whatever was necessary for the proposed changes. Pietro testified that some of the costs involved in these changes (for example, the implementation of a drug plan) could not be known until mid-April at the earliest.

13. At Ungerman's request, Pietro typed up a notice on March 15th indicating the changes. These changes involved an increase in the minimum wage for all new employees, an increase in wages for all existing employees, the implementation of a drug plan, additional vacation benefits, payment for eight hours of holiday pay rather than the previously paid six hours, and reimbursement for OHIP costs after one month of service instead of the previously required three months. Ungerman also instructed Pietro that these changes were to be made across the board for all employees in all three plants. Pietro further testified that Ungerman did not tell her when any of these changes in benefits were to be implemented, although she testified that Ungerman told her to prepare the wage increases for the first week of April. It was not until approximately April 4th that Irving instructed her to actually implement the raises as of that week. Pietro did begin however to cost out some of the increased benefits. No notice of any of these changes was given to any employee.

14. Though denying he exercised any managerial functions, Wayne Maracle described himself as Karl Ungerman's "right hand man". He testified that his duties and responsibilities consisted of doing whatever Karl Ungerman requested of him, and this included pitching in on various jobs and repair and maintenance of the various vehicles or plant equipment. The other evidence supported this testimony. Although numerous employees perceived Maracle as exercising managerial functions, we were not satisfied on the evidence that Maracle was in fact exercising such duties and responsibilities and we do not accordingly find him to fall within the parameters of section 1(3)(b) of the Act.

15. Wayne Maracle and Irving Ungerman both took an active role in terms of questioning employees about their support of the union, or about their knowledge of the views of other employees in this respect. On or about March 16, 1988, Wayne Maracle asked George Maracle (no relation) whether George knew that the union was trying to get into Royce Dupont. George told Wayne that Irving was afraid of the union trying to get in at Prime Poultry. Later that day Wayne Maracle asked another employee, Mark Phillips, whether Phillips had joined the union, and Wayne told Phillips that he thought a union was no good for the company. Wayne Maracle also asked Phillips if he knew who else had joined the union, and specifically asked him whether George Maracle's son Phillip Maracle had joined the union. Phillips advised Wayne Maracle that he didn't know anyone else who had joined. That same day, Wayne Maracle directly questioned Phillip Maracle, in the basement at Royce Dupont, asking Phillip who was starting the union in the cooler (the part of the operation where Moretton worked) and to come and see Wayne if Phillip found out who was involved.

16. Throughout this period the union continued to organize and to obtain membership cards from employees. Moretton continued as an employee of Royce Dupont and continued to put employees in touch with Dayman for organizing purposes. On March 25th, 1988, the union filed an application for certification. It was clear that by this time most, if not all, of the employees knew of the union organizing campaign. As noted, Karl Ungerman had testified that he knew of the campaign by around the 1st of March. Many employees had been approached by Moretton and/or Dayman as part of the organizing campaign and Wayne Maracle had questioned a number of them about their views.

17. On March 28th, 1988, Irving Ungerman convened a meeting of all available employees of Royce Dupont at the Royce Dupont premises. It is common ground that approximately fifteen to twenty employees attended this meeting convened by Ungerman, including Moretton. It was quite unusual for Ungerman to address employees in such a forum.

18. The union alleged that many of the statements Ungerman made at this meeting constituted unfair labour practices, and were part of the basis for its request that a certificate issue pursuant to section 8. In his testimony, Ungerman in both examination-in-chief and cross-examination denied making any of the statements attributed to him by the union. Unbeknownst to Ungerman, Moretton had a concealed tape recorder and made a tape-recording of the entire meeting. Over the objection of counsel for the respondent and counsel for Maracle, the Board ruled that the tape-recording could be played to Ungerman during his cross-examination by the union. As Ungerman was unable to continue his cross-examination after this direction was made, the tape-recording was never played for Ungerman. When the issue arose, during Moretton's evidence, the Board ruled that the tape-recording could be played to Moretton.

19. There are relatively few decisions of the Board dealing with the admissibility of a tape-recording made in circumstances as arose in this case, a surreptitiously made tape-recording of a "captive" audience meeting of employees convened by an employer, and sought to be played to a

witness in the context of an unfair labour practice complaint. In *Wilco-Canada Inc.* [1983] OLRB Rep. June 989, the Board admitted a tape-recording, but there does not appear to have been any objection to the playing of the tape in that proceeding. However, in *J. Sousa Contractor Limited* [1988] OLRB Rep. Oct. 1027, the Board wrote in part as follows:

22. Finally, we note that our assessment of the reliability of Maria Silva's evidence was based in part upon a comparison between her oral evidence and the contents of a tape-recording made by George Oliveira of a conversation between them in the respondent's office on August 21, 1988. The Board unanimously dismissed (orally) the respondent's objection to the admission into evidence of that tape-recording.

23. In that regard, the Board considered that, except in limited circumstances which were not applicable, the Board does not have a discovery process in its proceedings. In the circumstances of this case, there was no obligation on the applicant to disclose any evidence, including the tape-recording, relevant to the proceedings, whether or not it intended to rely on it, prior to the hearing as the respondent complained it should have. In addition, applicant's counsel had put the statements he asserted were contained on the tape-recording to Maria Silva in an express and particularized way, although he did not first advise her of the existence of the tape-recording. In our view, the rule of fairness articulated in *Brown v. Dunn* (1893) 6 R. 67 (H of L) (adopted in *Peters v. Perras* (1909) 42 S.C.R. 244 (S.C.C.) and *United Cigars Stores Ltd., v. Buller* (1931) 66 O.L.R. 593 (Ont. C.A.) had been substantially complied with. Even though, on a strict construction, the applicant had breached the rule in *Brown v. Dunn* by not disclosing the existence of the tape-recording earlier, the tape-recording was still admissible. In determining the admissibility of evidence where the rule in *Brown v. Dunn* has been breached, one must consider all the circumstances, including the extent to which the rule has been breached, the reasons for the violation of the rule, the significance of the fact(s) in issue sought to be contradicted, and whether the rule has been violated by the party carrying the burden of proof (see *Machado v. Berlet et al* (1986) [57 O.R.] (2d) 207 (Ont. H.C.); *Murray v. Woodstock General Hospital Trust et al.* (1988) [64 O.R. (2d) 458]).

24. In this case, the rule in *Brown v. Dunn* had been substantially adhered to, the facts in issue to which the tape-recording relates are central and not merely collateral, the respondent had, pursuant to section 89(5) of the Act, the burden of proof with respect to those facts, and, though it was no doubt intentional, the non-disclosure by the applicant was not inconsistent with current practice before the Board. Further, no other rule of fairness, natural justice, or evidence made this tape-recording inadmissible. A tape-recording, if proved, can be evidence (probably the best evidence) like any photograph, video tape, or other "document" within the meaning of the word in law (see for example Rule 30 of the Ontario Rules of Procedure). The Board also has the discretion, under section 103 of the Act, to determine its own procedure and to accept such evidence as it considers proper. Further, the respondent had the right to re-examine Maria Silva or to call evidence to explain the contents of the tape-recording, and the respondent's counsel could (and did) make adverse comment on the failure of the applicant to disclose the existence of the tape-recording earlier.

25. Mrs. Silva unequivocally denied making most of the statements attributed to her when they were put to her by the applicant's counsel. However, she identified the tape-recording and agreed that it was an accurate representation of the conversation she had with George Oliveira on August 21, 1988. There is no evidence to suggest that the tape-recording is anything less than accurate. This included the statements which she had previously denied.

20. Many of the comments in paragraph 24 of the passage just quoted apply to the instant case. The tape-recording represents evidence of what is claimed by a party to have occurred at a critical "captive" meeting. The statements alleged to have been made by Ungerman at this meeting are themselves alleged to have constituted unfair labour practices. The tape-recording is simply one type and form of evidence of what is alleged to have occurred at that meeting. When Ungerman was being cross-examined, he was first given the opportunity to admit or deny that he made the alleged statements. Only then did counsel disclose the existence of the tape and seek to play it to Ungerman. Had Ungerman admitted the contents of the tape-recording after listening to it, then

the Board could have relied upon it, but failing such admission, the Board would have had to be satisfied, through other evidence, that the tape-recording accurately reflected the events it portrayed. Playing the tape-recording to Ungerman became impossible because of his inability to continue with his cross-examination. But Moretton had made the tape-recording and testified about the circumstances of making that tape and its contents. Just as in appropriate circumstances a witness can place in evidence notes made contemporaneously with the relevant events, similarly a tape-recording made by a witness is in these circumstances admissible. There was no legal impediment to admitting the tape nor any labour relations purposes that ought to lead us to hold inadmissible such a tape-recording. The tape-recording simply enabled the Board to have the best evidence of what occurred at that meeting, and enabled the Board to more accurately determine the exact wording of the statements made at that meeting. In this respect, we note that subsequent to the playing of the tape-recording in the hearing, no witness was called by the respondent or by Wayne Maracle to deny that Ungerman made any of the statements on the tape or to suggest that the tape-recording was inaccurate in any respect.

21. Even if the tape-recording had not existed and been played in the hearing, we reject Ungerman's version of what occurred at that meeting. Both in examination-in-chief and in cross-examination he contradicted himself and obviously was giving answers that he felt were in his or the respondent's best interests. He was also contradicted in a number of respects by witnesses called by the applicant and by other witnesses called by the respondent. For example, Ungerman vigorously denied having mentioned the union in his March 28th comments as in his view he had been around long enough to know better. In contrast, Jerry LeBlanc, a twenty-three year employee called as a witness by the respondent, testified in examination-in-chief that Ungerman had discussed the union, and in cross-examination he admitted that Ungerman had indicated that if the union came in, people would be sent home if there was no work, whereas at present Ungerman would assure that everyone got forty to forty-two hours of work a week. Similarly, other witnesses gave *viva voce* evidence of various statements alleged to have been made by Ungerman at the meeting. Quite apart from the existence of the tape-recording therefore, the Board was satisfied that Ungerman had made many of the statements which we have subsequently concluded constituted unfair labour practices, including his threats to the jobs of his employees.

22. That meeting of March 28th lasted approximately thirty minutes, by the end of which Irving Ungerman had clearly indicated that employee jobs were at risk if the union came into Royce Dupont. He had also indicated that wage increases might not occur because of the union, and he had blamed the union for any future lack of work. He had commented on why a vote or legal proceedings to try to get the union in would not be successful. We quote, without correction, his words:

Today I just finished with Prime. You know that I've been away for a long time now eight weeks trying to get that new place going. Once I got that new place, people have come in and we didn't know who ... I want to tell you now if you want union, you better speak up. Everybody has been voting, I want to know what the score is because we'll take today with Prime. We had our vote there today. It went twenty-three No, three Yes. Okay. That's what happened up there. If we are going to do the same thing here again, I got to know because we got to stop killing here ["killing" refers to the killing of the chickens]. So we don't need so many people. If you trust me, everybody trust me like it has, we got ten more years here, twenty years....If anybody is coming in here and talking and starting something, bad apple creates for everybody.... It started up at Prime, it started down here. I am not going to stand for it... Everybody is getting raises but if they do anything before and they want to negotiate, that's fine. We'll sit and wait, if that's what you want. If you don't want it, now is the time to say you don't want it. Don't wait to make legal and fight for six months and, and never get it because just like today, we finished at Prime today eleven o'clock finished. I could send everybody home. I don't send anybody home. I make them work forty hours a week, forty-two hours a week. I don't say go home because nothing to do. Union say okay pay \$2.00 an hour more an hour but get the hell home at twelve

o'clock... I want to have the census opinion here what you people want. ... Now, if you all want to go through, I got to know it, I am not going to wait because I have other methods to do.... If there is a union, this place will not operate. Fifty per cent of it. It will just become a distributor and that's it.... There has been everybody, other people have been approached here. I know it, it's come to me and I know where it is. Those of you, now what we did up there, we took vote today. We had to get a vote to find out yes or no what route we are going to go. Do we expand that one and try to do something with it, do we close this one or let half the people go back down to twenty people here or do I keep forty people here. I mean I got to know it now.... If the guys want to get together and they want to find out what they want to do, you got to tell me yes you want to try to unionize. That's fine. Go ahead and try it and we'll play around with it for six months and we'll see who wins. ... You see once they start that, they stopped Prime. You know how they stopped Prime, we didn't hire no more people, we didn't fire no people, we didn't kill any more, we just stopped. Same happens with St. Clair. I expect that no fryers should be killed here. ... You want to fool around, we fool around for six months, the lawyers come, they fight back and forth. By the time it's finished, we are down to twenty people. ... So any of you people that are not happy and you think you can organize there is still a vote to be taken..... I am telling you now that I am the boss ... Now, the minimum wage here is \$6.50 maybe it should be \$7.50 maybe that's what I am going to do; maybe I am going to pay \$8.50 but I don't want nobody starting this bullshit because we had a good relationship. ... Fine, join the bloody union. Nothing wrong with it. Go some place else. Don't come in here. ... Instead of waiting which we normally would do June, because we give raises twice a year, I am now going to be doing something up at Prime and St. Clair and I intend on doing it here. And that's why I am bringing it to you right now because if the census here are that they want it, then I'll let this sit till the time comes. If the vote here is no, then I do something right away now. If the vote is yes, the census that they want it, then I can't do nothing. ... Fighting takes six months or a year. During that six months or year half the people will be out...

23. Karl Ungerman denied in his testimony that he participated in this meeting, but the evidence disclosed that he did. Karl stopped by the meeting at one point and told employees "if the guys want it that's fine. Half the guys will do half the work. Lay off half the guys."

24. After this meeting was over, Irving Ungerman proceeded to the second floor of Royce Dupont where he addressed other employees. We have no evidence of what occurred at this second meeting.

25. These meetings took place at a time that Irving Ungerman testified he was completely unaware of the union organizing campaign. Three days later, on March 31st, at a time when Ungerman would still have been unaware of the union campaign if his evidence is to be believed, Ungerman again convened a meeting of employees, this time accompanied by legal counsel. At that meeting Ungerman read verbatim to employees a text drafted for him by counsel. In this speech Ungerman stated that he was aware that some people were working for the union and that some employees had already signed up into the union. He indicated that under the laws of Ontario, employees had the right to join a union or not as they wished. Ungerman hoped employees would feel that they didn't need a union at Royce Dupont. Ungerman continued reading the statement and said that "at most unionized companies when there is not enough work to keep the people busy, they get sent home and sometimes work only thirty or thirty-two hours a week. As you know, we have always tried to provide a full forty-two hours of work per week... Some employees have come to me and told me that the union is coming to their house to try to get them to sign a union card, and they don't like it... You have every right to refuse to sign a card, if that is your wish. No one can lose their job for refusing to sign." This speech did not acknowledge that the captive audience statements of March 28th had been made, nor did it indicate in any fashion that Irving Ungerman was withdrawing any of the remarks he had then made. No discussion occurred at this March 31st meeting. It consisted only of Ungerman reading out this statement in the presence of his lawyer. The union did not allege that these comments breached the Act.

26. In the week after these meetings, Phillip Maracle was asked, as he was occasionally, to

go and tell Ungerman to move his car because as it was blocking some of the delivery trucks. Phillip went to the office and passed on the message asking him to move his car, and then he and Ungerman and Wayne Maracle went downstairs. With only the three of them present, Irving Ungerman asked Phillip if he would speak to him later in his office, and Phillip responded no. Ungerman then asked if Phillip would tell him the truth if he asked him to talk to him later and Phillip again indicated no. Ungerman then asked Phillip some questions about the union. Phillip's working conditions were discussed. During the work week Phillip and his father George Maracle stay in accommodation owned by Irving Ungerman, and at quite reasonable rent, and because of their need to commute to their out of town home every weekend, Phillip had always been allowed to go home Fridays at twelve noon, before the end of the normal shift that day (although he put in extra hours during the week to compensate). Ungerman told Phillip during this conversation that he would raise his rent substantially, and Wayne Maracle told Phillip that he "would make it so Phillip was unable to go home Fridays at noon". Ungerman then told Phillip that all this could be stopped and Phillip ought to think about it. He also told Phillip that he'd have to lay off twenty to thirty people and he'd bring the product in from Prime and all the Royce Dupont employees would do would be to write up the boxes of product.

27. By this time, the first week of April, Royce Dupont would have likely received from the Board official notification of the Application for Certification. The Return of Posting card, returned to the Board by the respondent indicating when the respondent had posted the appropriate notices, is dated April 6, 1988. At least by this date the official notification must have been received by Royce Dupont.

28. Around the beginning of April, no later than April 4th, Irving Ungerman instructed Pietro, his bookkeeper, to implement the changes in wages and benefits that he had first discussed with her on or about March 15th. The uniform wage increases were in fact implemented in the first week of April. There had at that point still been no notice to employees of these changes in benefits, and the first notice they would receive was when their pay cheques of April 12th reflected a higher amount. The Notice of the changes that Pietro had drawn up on March 15 was not posted until approximately April 14th, after some of the changes had already been implemented.

29. After the March 28th meeting at which Ungerman had made various threats, the union continued to try to sign up employees. Between four and seven employees were approached after March 28th, but not one of them would sign a membership card. Dayman testified that prior to the March 28th meeting, no employee who had been approached to sign had given an outright refusal, but that no one approached for the first time subsequent to March 28th agreed to sign. Only three additional cards were obtained after the application date, and these employees had previously been approached by the union and discussed signing. One employee who had been approached prior to March 28th who had indicated he would sign, declined to do so after March 28th. Moreton testified that after the March 28th captive meeting employees would not even open their door when he and Dayman visited. The weekend before the terminal date, April 13th, the union essentially gave up trying to obtain further memberships.

30. Shawn Persaud started working at St. Clair in September, 1987. After three or four weeks there, he was fired because he couldn't get along with the plant manager, Al Maracle, the son of Wayne Maracle. While at St. Clair, Persaud had two accidents driving the company vehicle, and he had also experienced a cash shortage in his collections from customers. After he was fired, Persaud was hired as a driver by Royce Dupont.

31. Persaud was not a very satisfactory employee for Royce Dupont either. He continued to have driving accidents with alarming regularity, his attendance was intermittent and somewhat ran-

dom, and he had further cash shortages. As a driver, Persaud's duties and responsibilities included delivering the produce to various customers and receiving from them payments for the delivery. It was the moneys from these payments which were on occasion short and which, at least once, Persaud had to make good from his own funds. Although Persaud testified that during April some time Irving Ungerman questioned him in his office about whether Persaud had joined the union, we did not find Persaud to be a particularly credible witness and we conclude this questioning did not occur.

32. On May 30th, 1988, Karl Ungerman discovered that Persaud's licence had been suspended because of his driving accidents and otherwise poor driving record. Karl immediately confronted Persaud and indicated that he could no longer drive for the company. As there was no non-driving job available at Royce Dupont at the time, Karl suggested that Persaud approach his brother Irving and ask him about a job at Prime Poultry. Karl testified that the sole reason for Persaud's discharge from Royce Dupont was the fact that he could no longer drive because of his licence suspension and Margaret Pietro confirmed this in her testimony. As recommended by Karl, later that day Persaud spoke to Irving Ungerman about the possibility of working at Prime. Wayne Maracle was present during this conversation. Ungerman asked Persaud whether he had joined the union, and asked Wayne whether Wayne knew if Persaud had joined. Wayne told Ungerman that he knew who had joined and who had not. Irving then told Persaud he could begin to work in the cooler up at Prime.

33. The next day, May 31, 1988, Persaud began working up at Prime in the cooler, a job which involved no driving nor any handling of cash. He continued to be listed on the payroll of Royce Dupont and to be paid by the respondent. In his second week at Prime, on the morning of June 6th, Persaud phoned the office there and spoke to Irving Ungerman's nephew. Persaud told him he would not be able to come in that day as he had to take his daughter to the hospital, for her regular speech therapy classes. Persaud was advised by Ungerman's nephew to speak to Ungerman about it the following day. Later that same day, the union filed with the Board one of the instant unfair labour practice complaints (Board File 0609-88-U). The union alleged in the complaint that Royce Dupont had breached the Act when Irving Ungerman had questioned Persaud about whether or not he had joined the union and had indicated that if Persaud kept his mouth shut about the union he could continue to drive. When Persaud returned to work June 7th, he spoke to Ungerman about his absence the previous day and Ungerman told him not to let it happen again.

34. On Friday, June 10, Persaud was called into Ungerman's office at Prime and discharged by Ungerman. Ungerman told Persaud that he was being discharged because of his poor driving record and inability to drive. Though he said nothing to Persaud at the time about his attendance record, in his testimony Ungerman expanded upon the reasons for discharge and stated that Persaud's absenteeism record was an additional justification for the discharge. Ungerman denied any knowledge, at the time of discharge, of the unfair labour practice complaint filed on behalf of Persaud, and he similarly denied that Persaud's union involvement formed any reason for the discharge.

35. The Board is satisfied that Persaud's discharge was the result of Ungerman discovering that an unfair labour practice complaint had been filed on Persaud's behalf by the union. We say this for several reasons. Notwithstanding Ungerman's denial under oath, we are satisfied that he had received notice of the unfair labour practice complaint at the time of the discharge. Ron Terry, a long time employee, testified that he and Wayne Maracle were driving up to Prime Poultry on June 10th, and that Wayne Maracle told Terry during the drive that Ungerman had received something from the union about Persaud that morning and Ungerman was pretty upset as a result. We found Terry to be a credible witness and we accept his evidence. Secondly, there is no other ratio-

nal explanation for the discharge occurring when it did. There is no question that Persaud continued throughout his employment history with Ungerman's companies to be far less than a good employee. And there is no question that many other employers would have discharged Persaud long before. Nevertheless, the reasons given by Ungerman for the discharge are not credible. Persaud's driving record was not an issue at Prime, where he was not required to drive, and the driving record had in any event been fully known to Ungerman at the time Persaud had been discharged from Royce Dupont (we use "discharged" here in a colloquial sense, as Persaud continued to be paid by Royce Dupont while working at Prime.) Similarly, any cash shortages that Persaud might have been responsible for in the past had occurred prior to his beginning work at Prime, were known to and accepted by Ungerman, and he was not required to handle cash at Prime. Insofar as his absenteeism is concerned, Persaud had always had a poor attendance record, yet Ungerman had transferred him to Prime. In the two weeks Persaud had worked at Prime, he had only missed one day (Monday of the second week), he had phoned in to explain he would be absent and no resulting action had been taken by Ungerman. Ungerman reacted, by firing Persaud, only when he was aware that the union was assisting Persaud. Thirdly, Ungerman's own testimony supports the conclusion that Persaud's union support and the filing of a complaint effected how Ungerman viewed and treated him. For example, when Ungerman was being questioned about the events surrounding the Persaud discharge, he was asked whether he had questioned Persaud about joining the union before offering him a job at Prime. In response, Ungerman testified "no ... I never thought that after all our assistance to him that I would suspect any problem with an individual like that." And to take another example, Persaud testified that after being discharged he told Ungerman that he would be hearing from the union, and that Ungerman then replied he knew and that was why Persaud was being discharged. When Ungerman was asked in examination-in-chief, whether he had said this to Persaud, Ungerman responded "no way, I didn't know he was a part of it or I would not have given him three chances." Though we do not conclude that Ungerman made anti-union comments when he fired Persaud, we do conclude that the discharge was motivated in large part by Persaud's support for the union and by the fact that an unfair labour practice complaint had been filed on his behalf.

36. Ron Terry dropped Wayne Maracle off at the Prime plant, after being told by Wayne that Ungerman had learned that the union had filed something for Persaud. On his return drive to Royce Dupont, he encountered Persaud on the street. Persaud had just been discharged and was walking away from the plant. Persaud told Terry that he had been discharged, and told Terry it was because the union had notified Ungerman. Terry told Persaud that he had already heard this from Wayne Maracle. When Terry got back to the Royce Dupont plant he spoke to several other employees about these events and told them about Persaud being fired because the union had notified Ungerman.

37. The evidence did not deal with matters occurring subsequent to these events.

III - The Decision

38. We turn first to a consideration of the sufficiency and reliability of the membership evidence filed on behalf of the applicant and the sufficiency and propriety of the Form 9 Declaration. Don Dayman was the Form 9 declarant and the collector for all but two of the membership cards or applications. Moretton collected those two cards. Two of the membership cards submitted by the union were completely undated and a third card gave only the month and day of the month, without also noting the year. A fourth membership application or card contained no name or number of the local in the appropriate space. None of these omissions or circumstances were set out and noted in the Form 9 Declaration.

39. Paragraph 3 of Form 9 reads as follows:

(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

40. With respect to the card on which the local's name or number was missing, the applicant did not seek to rely on this card in final submissions, and acknowledged that according to Board jurisprudence such card must be rejected. The Board finds that this card must be rejected: see, for example, *P. & M. Electric (1982) Ltd.* [1988] OLRB Rep. Aug. 843; *PRC Chemical Corporation of Canada Limited* [1980] OLRB Rep. May 749; *Maple Leaf Mills Limited* [1984] OLRB Rep. Oct. 1474.

41. The date on which a card is collected is not a substantive aspect of membership and *viva voce* evidence can be entertained by the Board with respect to when the cards were actually signed. With respect to the cards missing dates, the *viva voce* evidence of Dayman and Moretton on this point satisfied the Board that all the cards submitted on behalf of the applicant were collected during the months of February, March, or April of 1988. These three cards will accordingly be accepted by the Board as reliable membership applications.

42. Insofar as the Form 9 Declaration is concerned, Dayman testified about the circumstances of the collection of the cards, the inquiries he made of Moretton and the circumstances of his signing and filing the Form 9 Declaration, and the Board found his evidence credible and reliable in this respect. Having regard to that evidence, and having regard to the purpose for which a Form 9 is required (see for example, *P. & M. Electric (1982) Ltd.* (*supra*), and having regard to the text of paragraph 3 of Form 9, we were satisfied that the Form 9 Declaration was not improper in any respect. In light of these conclusions the union had filed valid memberships on behalf of employees representing, at a minimum, slightly more than thirty-six per cent of the bargaining unit at the relevant time. In addition, given the unresolved challenges with respect to the employees in the bargaining unit, the level of support could well be higher.

43. Turning next to the request pursuant to section 8, that section of the Act reads as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

44. Sections 64, 66, 70, 79, and 80, relied upon by the union, read as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,
 as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 53 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was com-

plied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto.

80.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

45. In order for a certificate to be issued pursuant to section 8, the Board must be satisfied that three conditions have been met:

- (1) The respondent must have contravened the Act.
- (2) The contravention must have resulted in a situation such that the true wishes of the employees of the employer are not likely to be ascertained.
- (3) The applicant must have membership support adequate for purposes of collective bargaining.

46. There is no question that numerous activities engaged in by the respondent contravened the Act. First, examining the activities of Wayne Maracle, although we did not conclude that he exercised managerial functions himself, he must be taken to have been acting on behalf of the Ungermans and therefore the respondent. Wayne Maracle was the "right hand man" for Karl Ungerman. Wayne's son was the senior manager at St. Clair Poultry, and employees of the respondent knew this. On March 16, 1988, while the union organizing campaign was in full swing, Wayne Maracle questioned Phillip Maracle about whether Phillip knew who was starting the union and asked that Phillip come and see Wayne if Phillip did find out. That same day Wayne Maracle also questioned Mark Phillips, asking him whether he had joined the union and asking him as well whether he knew if Phillip Maracle had joined. Although this conversation took place without any member of management present, Wayne's subsequent actions in concert with Irving Ungerman would have made manifest the purpose of the questioning, and on whose behalf Wayne was acting.

Wayne and Irving Ungerman together questioned Phillip Maracle about the union around the first week of April, and both were again present when Ungerman threatened to raise Phillip Maracle's rent, and to lay off 20 to 30 people. During the same conversation, Wayne himself threatened Phillip because of his supposed union support. Shortly after Ungerman had received something from the union with respect to Persaud, (the June 6th complaint), Wayne knew Ungerman had received it. Employees were aware of most, if not all, of these events and of the nexus between Wayne Maracle and the Ungerman brothers. In all these circumstances, it is clear that Wayne was acting on behalf of and with the support of the employer. The threats and the questioning of employees about their personal views of the union or their knowledge of the views of other employees breached sections 64, 66 and 70 of the Act.

47. Secondly, there are Irving Ungerman's other activities. Shortly after the individual questioning of employees about their union support and their knowledge of other employees' support for the union, Ungerman convened the March 28th captive meeting of employees. The threats he made during this meeting are set out more fully above. It is sufficient for our purposes here to note that Ungerman repeatedly made clear to employees that their individual job security and perhaps the entire operation at Royce Dupont could well depend upon the success or failure of the union organizing campaign. In graphic and certain terms Ungerman told employees that because of the union campaign work could be or would be transferred out of Royce Dupont, or that Royce Dupont might close down entirely. He told employees that increases in wages and other beneficial changes in benefits and conditions of work were linked to the union's organizing campaign. If employees were thinking of a vote, Ungerman pointed out that the vote had been held at Prime that same day and the union had lost badly there and if a vote resulted at Royce Dupont, then the plant would stop doing much of its work. If the problem with the union was not resolved quickly, Ungerman told them that work opportunities might disappear. He also told employees that legal procedures and legal hearings would not help, that this matter could be dragged out until employees suffered on that basis. The message was clear: Irving Ungerman was the boss, he controlled their economic lives, he would use this power to ensure they lost their jobs if the union came in and to ensure they benefited if it did not, and he had all the angles covered. The message was simple and effective. It was also illegal. The statements he made constitute breaches of sections 64, 66, and 70 of the Act.

48. Within a week, Ungerman implemented the raises and other changes in benefits and conditions that he had discussed in his March 28th speech. It is unnecessary for the Board to decide whether this extraordinary, uniform improvement in wages and benefits constituted a violation of section 79 of the Act, as it clearly constituted a breach of sections 64, 66, and 70 of the Act. Ungerman, in effect, told employees at the captive meeting that the implementation of all these benefits was associated with opposition to the union. He then followed up these statements with a concrete example of how he was "the boss", and could and would affect the employment lives of his employees.

49. Finally, Persaud's discharge from work at the Prime plant was motivated in large part by Ungerman's newfound awareness that Persaud was, despite Ungerman's prior belief, a union supporter. Discharging Persaud for that reason constituted a breach of sections 64, 66, and 70 of the Act. It is therefore unnecessary to consider whether section 80 was breached.

50. The pattern that emerged is one of Irving Ungerman engaging in a calculated and continuing campaign to deprive employees of their right to freely choose whether they wished to be represented by the union, and to deprive the union of its right to attempt to organize his employees. This campaign was characterized by individual questioning of employees and threats to employees that clearly put their job security at risk, together with concrete examples of Unger-

man's ability to effect their employment lives, demonstrated by the uniform improvement in wages and benefits and the discharge of Persaud, the first person Ungerman had discharged in approximately fifty years.

51. We turn next to consider whether these contraventions of the Act were such that the true wishes of the employees would not be ascertainable. When our oral decision was delivered at the hearing, Board Member Pirrie dissented solely with respect to whether this pre-condition of section 8 had been met; however the decision is now unanimous in this respect as well.

52. The respondent argued that no conduct occurring after the terminal date ought to be considered in determining whether the true wishes of employees are ascertainable.

53. In the instant case, the only contravention of the Act occurring after the terminal date was Persaud's discharge. Regardless of this contravention, we have no doubt that the remaining contraventions of the Act were sufficient to ensure that the true wishes of employees would even now not likely be ascertainable. The employees' job security was fundamentally and repeatedly threatened during the March 28th captive audience. Employees were told that any wage increases would be tied to opposition to the union campaign, and this was shortly followed with a previously unannounced uniform wage increase and improvement in benefits. There was also a clear implication in Ungerman's statements that a vote would be ineffective, as would employees or the union seeking to protect their rights through recourse to legal proceedings.

54. The respondent argued that whatever the improprieties or contraventions of the Act arising out of Ungerman's March 28th statements, they were effectively cured by Ungerman's follow-up captive audience of March 31. We do not agree. A meeting such as occurred on March 31 would not likely reassure employees their rights would be protected. Ungerman read from a prepared text with his counsel beside him. The text did not acknowledge that Ungerman had said anything improper on March 28th, it did not acknowledge that anything he had said no longer applied, nor would the context or format have indicated to employees that Ungerman and Royce Dupont were going to respect their rights and the rights of the union. We might usefully compare this curative attempt with that set out in *Elbertsen Industries Limited* [1984] OLRB Rep. Nov. 1564. In that section 8 proceeding, after discharging the union organizer and threatening plant closure, amongst other improprieties, the employer caused a letter to be distributed to employees which specifically rescinded the conduct which ultimately was found to have constituted unfair labour practices. The majority of the Board nevertheless concluded that in the context of all that had occurred, the letter was not sufficient such as to negate the impact of the contraventions of the Act. In the instant case, the speech of March 31st would not have had any meaningful palliative effect on employees. Not only did Ungerman acknowledge no wrongdoing on March 28th, the statements of March 31 were followed shortly by the more concrete action of an improvement in benefits that contravened the Act, further individual questioning and threats against employees for union support, and a discharge of an employee for his union activity.

55. In *Rock Haven Motels (Peterborough) Limited*, [1979] OLRB Rep. June 559, the Board wrote:

23. An applicant seeking certification pursuant to section 7a [now 8] must do more than show one or more contraventions of the Act. It must be shown that the contravention is of such a nature, or so pervasive in effect, that the true wishes of the employees cannot now be ascertained. An isolated illegal act may not unduly impede the ability of employees to express their wishes in a Board supervised representation vote - particularly where the bargaining unit is large so that employees can be assured that their anonymity will be preserved and the employer will not, as a practical matter, be able to penalize the union supporters. In *Winson Construction Ltd.*, [1976] OLRB Rep. (Nov.) 714, the Board offered this example of the kind of intimidat-

tory, or coercive, activity which would, by its very nature, be likely to obscure the true wishes of employees:

“No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it ... In such a situation to vote in favour of being represented by the trade union might well appear to employees to be tantamount to voting themselves either out of a job or at best, a drop in pay.”

24. In assessing an employer's conduct the Board must bear in mind that, while employer and employee are equals before the law, they are not usually equals in the market place. The employer will typically have a considerable degree of influence over his employees' economic destiny, especially if the number of employees is relatively small. He must for this reason be circumspect in his dealings with employees, and refrain from making statements which could reasonably be construed as a threat to their job security. As the Board observed in *Bell & Howell Ltd.*, [1968] OLRB Rep. (Oct.) 695 at p.706:

“An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.”

25. There can be no doubt that in the present case there has been a contravention of The Labour Relations Act; indeed, counsel did not contend that there had not been. We are satisfied that there has been a serious and substantial interference with the right of the applicant to organize, and the right of employees to select or reject a bargaining agent free from improper employer pressure. The pattern of threats, interrogation and direct approaches to employees in an effort to persuade them to repudiate their union membership constitute a breach of sections 56, 58(c) and 61 of the Act, [now sections 64, 66 and 70] all of which prohibit the intentional use of intimidation or coercion in order to compel an employee to refrain from becoming or cease to be a union member. Moreover, we are also satisfied that the illegal interference engaged in by the respondent is inherently likely to influence an employee's ability to vote in accordance with his own free wishes. The employer's actions have caused employees to believe that by supporting, or continuing to support, the union they could be placing their jobs in jeopardy. Employer antipathy to a trade union is neither unusual nor, in itself, illegal; but the present case goes well beyond simple opposition to the union and includes threats directed at union supporters and a threat to close the business rather than deal with a union. The employees have been warned that a vote for the trade union may well be a vote for unemployment. In the circumstances, we are satisfied that the true wishes of the employees are not now likely to be ascertained.

And see also *Straton Knitting Mills Limited* [1979] OLRB Rep. Aug. 801; *Banvil Limited*, [1979] OLRB Rep. Oct. 919; *G.T. Couriers (4166656 Ontario Ltd.)*, [1979] OLRB Rep. Dec. 1167; *Sunnylea Foods Limited*, [1980] OLRB Rep. Apr. 530; *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811; *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. Mar. 398; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Trulite Industries Limited*, [1983] OLRB Rep.

May 821; *Wilco-Canada Inc.*, [1983] OLRB Rep. June 989; *Elbertsen Industries Limited* [1984] OLRB Rep. Nov. 1564; *Benwind Industries*, [1985] OLRB Rep. Feb. 149; *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. Mar. 319; *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027. For similar reasons, the Board is satisfied that the true wishes of employees are not likely even now to be ascertainable.

56. The third and final condition precedent for the exercise of our discretion pursuant to section 8 is whether the union has membership support adequate for the purposes of collective bargaining. As the Board stated in *Skyline Hotels Limited* (*supra*):

61. The applicant has requested, as the only remedy now capable of remedying the wrong done to it by the respondent, a certification under section 7a [now 8] of the Act. That section reads:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

There is no doubt that the respondent has contravened the Act, and if ever there was a case where the true wishes of the employees are not likely to be ascertained by the conventional means now available, this appears to be it. But does the applicant have "membership support adequate for the purposes of collective bargaining"? This condition was added in the 1975 amendments of *The Labour Relations Act* (S.O. 1975, c.76). To gain some insight into its meaning, reference must be made to its predecessor section, which read:

7.-(4) If the Board is satisfied that more than 50 per cent of the employees in the bargaining unit are members of the trade union and that the true wishes of the employees are not likely to be disclosed by a representation vote, the Board may certify the trade union as bargaining agent without taking a representation vote.

In making this comparison, it becomes clear that the phrase "membership support adequate for collective bargaining" is not simply a reference to majority support. Were this the case, it would have made no sense to eliminate the explicit requirement for majority support already contained in section 7(4). Even more striking, however, is the removal of the words "by a representation vote" from section 7(4). By doing so, the Legislature appears to have clearly contemplated the application of the new section 7a, in appropriate cases, to situations where the applicant's membership support fell even below the minimum level required in the statute for entitlement to a representation vote. (See also *Lorain Products*, [1977] OLRB Rep. Nov. 734). The section could now apply, in other words, to situations where the employer's response is so massive and so early as to prevent a trade union from ever attaining the level of support needed for a vote. This, as the Board has found, is precisely the case here. Had it not been for the unlawful interference of the respondent, the applicant might well have garnered the 35 per cent support it initially sought for the taking of a pre-hearing vote. As it is, the applicant can demonstrate the membership support of only 30% of the unit. Is 30% sufficient in this case?

62. The competing policy considerations which underlie a section such as section 7a are aptly set out by the British Columbia Labour Board in commenting on similar changes made to their own statute, in *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* [1974] 1 Can LRBR 13, at page 20:

...Certification without a vote...creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct. ...However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of

choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means... I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used..

As the above passage underscores, the true wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive. As well, where the support is not there, the Board is scarcely placing the trade union in an enviable position by sending it off with a certificate. On the other hand, the Board must not hesitate to consider the provisions of section 7a when an employer's own conduct seriously impairs the Board's ability to ascertain with more certainty what the wishes of the employees are. As the B.C. Board went on to say in *Forano Limited*:

...the Board must not be afraid to use it when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it is for the Board to certify the union...

63. These policy considerations are clearly reflected in our own section 7a. The "brightline" test fixing a minimum level of support needed for certification is gone, and an employer who intervenes unlawfully takes his chances. On the other hand the Legislature has added the eminently practical *caveat* that the Board not certify unless the applicant trade union, in the opinion of the Board, has membership support adequate for the purposes of collective bargaining. What this will mean in terms of percentages must vary with the facts of each case, and no single catalogue of criteria can be laid down (see *Viceroy Construction Ltd.* [1977] OLRB Rep. Sept. 562). It clearly will involve the Board in some measure of speculation. The duty of the Board to make this assessment only arises where the employer has intentionally destroyed the more reliable and conventional means of ascertaining employee wishes - and such speculation must be undertaken with care.

57. When the application for certification was filed on March 25th, the organizing campaign was still ongoing, though not at its earlier pace. Section 8 is not to be relied on to grant a certificate where the organizing drive has stalled of its own accord. That is not the situation here, given the numerous and egregious unfair labour practices we have found and the stage of the organizing campaign at which they occurred. The issue is whether the union has membership support adequate for collective bargaining. We are satisfied that a core of employees favouring representation by the union is sufficiently large such that collective bargaining is viable. Accordingly, we are satisfied that the third condition of section 8 has been met, and it is appropriate to issue a certificate pursuant thereto.

IV - Relief

58. The Board has found that the respondent violated sections 64, 66, and 70 of the Act in the March 16th questioning of Phillip Maracle and Mark Phillips, in the statements made by Irving Ungerman at the March 28th captive audience, in the changes in terms and conditions implemented by the respondent on or about April 4th, 1988, in the questioning of Phillip Maracle by Irving Ungerman and Wayne Maracle in the first week of April, and the threats directed at Phillip Maracle during that conversation, and in the discharge of Shawn Persaud from Prime on or about June 10th, 1988.

59. In a brief decision orally delivered March 22, 1989, and reduced to writing on March 28, 1989, the Board directed that a certificate pursuant to section 8 would issue forthwith. That certificate has therefore already issued.

60. The Board will remain seized with respect to all aspects of remedial relief with respect

to Persaud, to afford the parties an opportunity to attempt to resolve this matter amongst themselves. There shall be no order at this time with respect to either compensation or reinstatement for Persaud.

61. In *Wilco-Canada Inc.* (*supra*), the Board stated:

50. As reflected in a number of decisions, the Board has recognized that the issuance of a certificate under section 8 will often not by itself suffice to place the applicant in the position that it would have been in if the respondent had not contravened the Act. This is particularly true where, as in the present case, the respondent has engaged in flagrant violations of the Act by threatening employees' job security generally and discharging several union organizers. In such circumstances, it is appropriate for the Board to exercise its remedial jurisdiction under section 89 of the Act not only to reinstate those individuals with appropriate compensation, but also to attempt to establish conditions that will promote fuller employee participation and understanding with a view to producing a more constructive climate for the exercise of the collective bargaining rights which will flow from these proceedings. Failure to do so would risk consigning the section 8 certificate to a climate where a collective agreement could be difficult, if not impossible, to realize. (See, for example, *Manor Cleaners Limited*, *supra*; *Robin Hood Multi-foods Inc.*, [1981], OLRB Rep. July 1972; and *K-Mart Canada Limited* (Peterborough), [1981] OLRB Jan. 60.) Accordingly in addition to directing reinstatement of Messrs. Molyneux, Bishop, and Duquette, and recall of Dan Wood, with compensation (to the extent indicated above), the Board finds it appropriate to direct the respondent to provide the union with employee lists, to permit union representatives to meet with employees on each of its shifts for a maximum of one hour on company premises during working hours, and to provide the union with access to employee bulletin boards. In view of the large number of layoffs which have occurred during the course of these proceedings, we also find it appropriate to supplement our usual "posting" order with a "mailing" to ensure that all bargaining employees will receive notice of the Board's decision in this matter.

62. For similar reasons the Board will issue comprehensive remedial directions here. No direction to cease and desist violating the Act would seem to be necessary in that there is no suggestion before us that Royce Dupont has continued to violate the Act subsequent to June 10, 1988. Having regard to the requested relief, we do however order that the respondent:

- (1) post copies of the attached notice, marked Appendix, after being duly signed by Irving Ungerman, in conspicuous places in its plant, where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a representative of the applicant so that the applicant can satisfy itself that this posting requirement is being complied with;
- (2) provide the applicant forthwith with a list of employees in the bargaining unit, their addresses and phone numbers (if available), and keep the list updated on a monthly basis for one year or until the applicant has entered into a collective agreement with the respondent, whichever shall occur first. Insofar as at least some employees of Royce Dupont apparently regularly work at the St. Clair or Prime plants though on the Royce Dupont payroll, this list of employees shall include employees who either work at or out of the Royce Dupont premises or are on the Royce Dupont payroll.
- (3) permit the applicant access to its plant during working hours for the

purpose of convening a meeting for a half hour on each shift to address employees with respect to unionization, out of the presence of any member of management.

- (4) At any meetings with employees convened by the respondent to discuss labour relations matters, provide the union and its representatives with reasonable notice, and allow them to be present throughout and allow such representatives equal time to respond during the same meeting to any comments made by the respondent. This direction will last for a period of one year, or until a collective agreement is concluded, whichever first occurs.
- (5) Provide the union with access to employee bulletin boards or other customary areas for posting employee notices to post notices relating to union business, for a period of one year.
- (6) At its own expense, mail a copy of the attached notice marked Appendix, after being duly signed by Irving Ungerman, to the residence of each bargaining unit employee.

63. The Board will remain seized with respect to any dispute arising out of the implementation of these orders.

Appendix

Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF THE UNITED FOOD & COMMERCIAL WORKERS' INTERNATIONAL UNION, LOCAL 175 TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY QUESTIONING EMPLOYEES ABOUT SUPPORT FOR THE UNION, BY HOLDING A CAPTIVE AUDIENCE MEETING WITH OUR EMPLOYEES AT WHICH WE THREATENED, INTIMIDATED AND UNDULY INFLUENCED EMPLOYEES, BY THREATENING PHILLIP MARACLE BECAUSE OF HIS UNION SUPPORT, AND BY DISCHARGING SHAWN PERSAUD BECAUSE OF HIS UNION SUPPORT. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;

WE WILL PROVIDE THE UNION WITH A LIST OF NAMES AND ADDRESSES OF ALL EMPLOYEES IN THE BARGAINING UNIT AND WILL KEEP THE LIST UPDATED ON A MONTHLY BASIS FOR ONE YEAR OR UNTIL WE HAVE ENTERED INTO A COLLECTIVE AGREEMENT WITH THE UNION, WHICHEVER SHALL FIRST OCCUR;

WE WILL PROVIDE THE UNION WITH ACCESS TO OUR PLANT DURING WORKING HOURS FOR THE PURPOSE OF CONVENING A MEETING FOR A MAXIMUM OF ONE HALF HOUR ON EACH SHIFT TO ADDRESS BARGAINING UNIT EMPLOYEES OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT;

WE WILL PROVIDE THE UNION FOR A PERIOD OF ONE YEAR WITH REASONABLE ACCESS TO ALL EMPLOYEE NOTICE BOARDS IN OUR PLANT FOR THE POSTING OF UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE;

WE WILL PROVIDE THE UNION WITH AN OPPORTUNITY TO BE PRESENT AT ANY MEETINGS CONVENED BY US TO DISCUSS LABOUR RELATIONS MATTERS, AND ALLOW THE UNION REPRESENTATIVES EQUAL TIME TO RESPOND DURING THE SAME MEETING, FOR ONE YEAR OR UNTIL WE HAVE ENTERED INTO A COLLECTIVE AGREEMENT WITH THE UNION, WHICHEVER SHALL FIRST OCCUR;

WE WILL MAIL AT OUR OWN EXPENSE A COPY OF THIS NOTICE TO THE RESIDENCE OF EACH BARGAINING UNIT EMPLOYEE.

ROYCE DUPONT POULTRY PACKERS

PER:

PRESIDENT, IRVING UNGERMAN

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 19TH day of MAY 1989

0997-88-U Retail, Wholesale and Department Store Union, AFL:CIO:CLC: and its Local 1000, Complainant v. Simpsons Limited, Respondent.

Interference in Trade Unions - Unfair Labour Practice - Bargaining unit position eliminated and persons in those positions promoted out of unit to a pre-existing managerial classification - Whether any anti-union animus in the expansion of the managerial classification or in the number of people promoted - Employer distributing to both unionized and non-unionized employees pamphlets enunciating its personnel policy - Whether contrary to Act - Complaint dismissed with respect to the promotion of bargaining unit personnel but allowed with regards to the pamphlets - Effect of pamphlets was to confuse employees concerning the nature of the union's representation

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *K. Davies*.

APPEARANCES: *Susan Ballantyne* and others for the complainant; *Wallace M. Kenny* and others for the respondent.

DECISION OF THE BOARD; May 15, 1989

1. This is the continuation of a complaint under section 89 of the *Labour Relations Act*, in which the complainant union alleges that the respondent company has violated sections 15, 64, 66, 67 and 70 of the Act. A panel of the Board differently constituted dealt with certain preliminary matters in a decision dated November 30, 1988. This panel dealt with a further preliminary issue as to whether allegations made subsequent to the original complaint would be heard with the original allegations or as a separate complaint by endorsing the record on December 22, 1988 to the effect that we would hear the evidence relating to both sets of allegations together.

2. The company operates a chain of department stores, including one in Oakville, which is the site of the events which form the subject of this complaint. The original complaint dealt with a reorganization which was put into effect at the Oakville store in July of 1988 in which the bargaining unit position "Department Head" was eliminated and each of the 14 existing Department Heads were ostensibly promoted out of the bargaining unit to "Sales Supervisor" a pre-existing managerial classification. The union challenges the legality of this move, alleging that it was motivated by anti-union considerations. In the alternative, an illegal impact on the bargaining unit contrary to section 64 of the Act is pleaded whether or not anti-union motivation is found. At the hearing of the complaint the union withdrew its allegations of bargaining in bad faith.

3. The second aspect of the complaint refers to the distribution of pamphlets called "Employee Safe-Guards" to bargaining unit employees, which the union alleges constituted bypassing the union and dealing directly with individual bargaining unit employees, contrary to sections 64, 66, 67 and 70 of the Act. The pamphlets dealt with various aspects of the employment relationship with the company, some of which are also covered by the collective agreement. It is alleged that several conflict with the collective agreement.

4. Both parties maintained that this case did not involve an application under section 106(2) as to whether or not the newly promoted persons exercised managerial functions and therefore were required to be excluded from the bargaining unit. However, the union argued that it was necessary to consider the extent to which the new Sales Supervisors exercised managerial responsibility in order to decide this matter and reserved its rights to bring a section 106(2) application concerning the Sales Supervisor classification. The respondent took the position that a consideration of the duties and responsibilities of the persons promoted was irrelevant to the consideration of the complaint and was a matter for arbitration. This matter was dealt with by the decision of the

Board, differently constituted, of November 30, 1988 which held that evidence on the duties and responsibilities, i.e. the extent to which the Sales Supervisors exercised managerial functions, would be heard in order not to unduly hamper the presentation of the complainant's case. The complainant takes the position that a determination of whether or not the persons promoted have been properly excluded from the bargaining unit is relevant to the determination of the motive of the respondent in promoting them, as well as to an understanding of the nature of the change in their duties. The Board has considered the duties and responsibilities of the newly promoted Sales Supervisors in contrast to their duties as Department Heads and in contrast to the duties of the people who were Sales Supervisors before the promotion of the people complained of in July, 1988 to the extent that the evidence disclosed this. We heard evidence from seven witnesses on behalf of the employer; the union elected to call no evidence.

(i) The Promotion of the Department Heads

5. We will deal first with the allegations concerning the promotion of the Department Heads. On February 8, 1988, a Store Operations Review meeting was held in the Oakville Store. Such meetings are regular semi-annual events in which the last six months' results are reviewed and the next six months' forecast. At the February, 1988 meeting, Brad Jacobs, the Manager of the Oakville store, suggested the promotion of the Department Heads to Supervisors in order, in his view, to promote the concept of ownership of a piece of the business in the store, particularly in sales development. He was of the view that the lines of communication were too tight given the number of Supervisors and Department Heads in existence at that time, and that there was too much for the supervisors to do. His proposal was to "flatten" the two levels of Supervisor and Department Head into one level of supervisory staff. At the end of the meeting this was left as a suggestion which he intended to commit to paper and forward on to senior management.

6. On March 4, 1988, negotiations between the union and the company, which were done on a provincial, rather than store by store, basis, concluded with the signing of a collective agreement. No mention of the restructuring proposal at the Oakville store had been made during negotiations. Nothing further happened about the Oakville restructuring proposal until the second or third week in March when Jacobs discussed it with Norm Richardson, the General Sales Manager. Richardson subsequently met with Andr 2i Joron, then Regional Human Resources Manager for the Toronto Region, to discuss some of the ideas from the store review, including the restructuring proposal. At this point Jacobs wrote up the proposal, including a salary structure and a proposed job description, which he was of the view contained no duties different from those being performed by the previous supervisors at the Oakville store, and submitted it for review by senior management. Jacobs received the go-ahead from Richardson in the middle of May, nearly six weeks after the conclusion of bargaining. He was told that the final details would be worked out with himself and Andr 2i Joron at the end of the month. The meeting in fact took place on the second Saturday in June in Jacobs' office. They discussed an implementation date, fine-tuned the job description and decided on an implementation date of July 1st. They also agreed on a schedule for training the newly promoted supervisors. Anne-Marie Jones, Human Resource Manager at the Oakville store, was responsible for organizing the training, and designed the training package with a focus on supervisory responsibilities.

7. Jacobs made a general announcement to the Department Heads at a group meeting in late May to the effect that a restructuring would be taking place and held individual meetings with each of them between then and July, 1st. At these meetings he discussed the job description and the new salary with each of the Department Heads. The union was notified of the restructuring by letter dated June 17, 1988, after the decision had been made.

8. David Crisp, Vice-President for Human Resources at the Bay since June 1, 1988, was the Chief spokesperson for Simpsons and the Bay in the last round of Ontario bargaining. He was not aware of the proposal to change the management structure at the Oakville Simpsons store during the negotiations. He was contacted about March 20, 1988 by Andr 2i Joron, the Regional Human Resources Manager who told him about the proposal and showed him a job description. Joron consulted Crisp because he was concerned that moving the Department Heads out of the bargaining unit would "cause concern in the union". Joron described the primary concept of the change as "to put the person in charge of merchandising with the person in charge of managing the staff." Crisp advised that it was definitely a supervisory position which would not be appropriate in the bargaining unit. No one suggested any intent to deplete the bargaining unit to Crisp, or he would have taken some further action. Crisp did not think the proposal would be approved by senior management when he reviewed the job description in March, because it would be an expensive experiment.

9. The union's complaint concerning the promotion of the Department Heads is two-pronged. The first argues illegal impact, regardless of motive, and the other alleges improper and illegal motive. Neither of the attacks can succeed if the Department Heads are to be considered properly promoted out of the bargaining unit. This involves two questions, firstly were the promotions *bona fide* promotions to managerial jobs, and secondly was any aspect of the promotions motivated by anti-union considerations.

10. We do not propose to set out all the evidence about the duties and responsibilities of the Sales Supervisors, which was given by all of the witnesses, including two recently promoted Department Heads. Having weighed all of the evidence on the duties of the former Department Heads and that of the former Sales Supervisors, we are of the view that the Department Heads were given the same duties as the former Sales Supervisors had and that the most accurate characterization of the management action here in dispute is the expansion of an existing job classification, rather than the creation of a new one. Without attempting to, as we were not asked to, make a declaration under section 106(2), we are of the view that the assignment of management and supervisory duties to the former Department Heads was not a sham and that, although all of the duties assigned had not been exercised in the short period of time between the promotions and the complaint, enough of them had been exercised to justify that finding. In particular, we note the hirings that have been done by former Department Heads since the time of the restructuring. The union argued that Human Resources was the effective hiring mind and that the fact that the Sales Supervisors received pre-screened candidates one at a time and could only accept or reject each one meant that they did not have the power of effective recommendation prior to hiring. We do not agree. There was no evidence that a negative decision on the part of the Sales Supervisors had ever been challenged, or could have been challenged by Human Resources. Nor was there evidence that Human Resources could hire an employee without the say-so of the Supervisor or that anyone besides Human Resources and the Sales Supervisors had any control over who was hired into the sales staff. In these circumstances the Sales Supervisors have the final say as to who is hired. Although there had been no firing in the period since the restructuring and we accept that Human Resources would have a very significant role to play in any discharge decision, all the evidence suggested that the Sales Supervisors have been given at least the effective recommendation decision making power of the matter of firing as well as hiring. Given that these two most fundamental aspects of control over the economic life of an employee are within the duties and responsibilities of the Sales Supervisors, we are of the view that these are *bona fide* managerial positions.

11. We are further convinced that there were significant changes in the duties and responsibilities of the former Department Heads who had no such control over the economic lives of their subordinates before their promotions. Anne-Marie Jones' and others' evidence that the Depart-

ment Heads had no responsibility for appraisals, individual development plans, recruitment, hiring, firing, coaching of employees, scheduling and discipline, while the Sales Supervisors did, went essentially unchallenged. This fact alone distinguishes this case from *Canada Post*, [1987] 15 Can LRB 289, cited by the union, in which it was found that there were no significant changes in the job duties of the classification in dispute, and that the employer's unilateral decision to exclude half of the bargaining unit was improper.

12. The fact that the Sales Supervisors maintain a large amount of time (15%) on the selling floor doing sales duties that would otherwise be done by non-managerial people, is not determinative of the question of whether these were *bona fide* promotions when they have the basic right to hire and fire. Similarly, we are not convinced that the fact that there are corporate structures and collective agreement constraints on the other supervisory duties assigned to the Sales Supervisors, such as scheduling of vacations, hours of work, etc. means that these classifications are any less managerial. The conflict of interest which is discussed in the Board's jurisprudence, including *J. M. Schneider*, [1987] OLRB Rep. Mar. 381, would clearly arise between employees who have the right of effective recommendation on hiring and firing together with the other duties set out above and those who did not.

13. As to discipline, although Jacobs' evidence indicated that Sales Supervisors were not in a position to do suspension or dismissal in the absence of consultation with Human Resources, nothing contradicted the evidence that they were able to give written warnings on their own, and the evidence did not establish that their role in discipline was less than that of effective recommendation.

14. The reorganization resulted in a numerical ratio of supervisors to other employees which changed from 8 supervisors to 42 bargaining unit employees to 20 supervisors to 23 bargaining unit employees. However, when this point is taken in the context of the fact that the supervisors supervise not just the bargaining unit people but also approximately 115 non-bargaining unit sales staff, the ratio of supervisors to subordinates is not sufficient to raise an inference that the supervisors are not really in managerial positions. Nor did the evidence establish that these numerical relationships create an irrational situation. The fact that supervisory duties are exercised only over non-bargaining unit employees in some departments, is not determinative of the question of the managerial status of those supervisors. See *Grand River Conservation Authority*, [1988] OLRB Rep. Mar. 298.

15. The union also argued that what had been done was a "sprinkling" of managerial responsibilities around the people promoted in such a manner as to make none of them managerial, as discussed in *Schneider, supra*, at paragraph 7. We agree with the Board's remarks in that case, to the effect that where managerial functions are not clearly assigned to particular positions, but distributed piece-meal, over a large number of individuals, it may be difficult to conclude that the requirements of section 1(3)(b) have been met. However, we do not find that the evidence established such a piece-meal distribution of duties. Rather, the managerial duties have been clearly assigned to the classification of Sales Supervisor. Although it has been expanded, the numerical relationship in this case between supervisors and subordinates does not establish such a dilution as to lead us to accept this argument. This is particularly true given the evidence establishing that they have been assigned responsibilities for hiring and firing.

16. The question remains as to whether there was anti-union animus either in the expansion of the Sales Supervisor position itself, or in the number of people who were promoted. The justification given by the company for its actions was that it was experimenting with a new concept of supervision, giving more people a portion of the control of the business in order to raise their

incentive to increase the profitability of the store. We are asked by the union to infer that that was not the real motive, or not the only motive in the restructuring. Based on the timing of the move the union argues there was an improper, anti-union motive. This argument is based on the fact that the restructuring was not implemented until after the conclusion of bargaining despite the origination of the idea before that date, and on the fact that the union's proposal for the Department Head's salary during bargaining was extremely close to the salary paid to the newly promoted Department Heads. The company's response to this second point was that the salaries were structured based on the range of the Sales Supervisors' previous salary scale, taking into account the lower seniority of the ex-Department Heads as opposed to the former Sales Supervisors. The evidence in the circumstances is equivocal and does not justify the inference requested. The company's evidence that the restructuring proposal was not in its contemplation at the provincial bargaining table was uncontradicted, as was the evidence that the proposal had not been authorized to proceed until several weeks after the conclusion of bargaining. David Crisp, whose credibility was not challenged by the union, testified that when the proposal was brought to his attention after the conclusion of bargaining, he was of the view that it would not be approved and that it was still very much an unapproved proposal. We therefore do not find sufficient basis to infer anti-union animus in this case. That the company could have done more in the way of communication to deal with the concern Joron knew the promotions would cause does not justify an inference of anti-union animus given the other facts of this case.

17. We therefore find that the promotion of the Department Heads was not a breach of the Act. Given this finding, this portion of the complaint must fail, together with the allegation that the payment of the higher wage rates to the former Department Heads violates sections 64 and 67. If the former Department Heads were excluded from the bargaining unit in a manner that is not improper, the company's action in regard to them are no longer subject to sections 64 and 67.

(ii) The Safeguards Pamphlets

18. The "Employee Safeguards" pamphlets, subtitled "A selected summary of Company Personnel Policies", cover the following topics:

- Corporate Perspective
- Development Discussions/Individual Development Plan
- Staff Scheduling
- Staff Representation Meetings
- Constructive Counselling & Discipline Procedure
- Job Redundancy
- Complaint and Grievance Procedure
- Harassment Protection Procedure

Crisp was involved in their preparation for distribution from 1985 onwards. They were intended essentially as an enunciation of personnel policy. The question of whether a disclaimer concerning conflict with the collective agreement was to be put in was discussed. Ultimately management decided that none would go into the pamphlets for two reasons. Firstly, they wanted to have identical pamphlets at the Bay and Simpsons. The Bay was larger and virtually ununionized and the company did not want "to raise questions which did not need to be raised." Secondly, from Simpsons' point of view there was a concern that a disclaimer would "create more questions than it would answer." Crisp intended to deal with the problem through the Regional Training Program for Managers and supervisors where he planned to reinforce that the collective agreement took precedence over policy and to have the pamphlets distributed only to non-union employees other than having them available in the Personnel Office. He believed he discussed this with the three provincial Regional Managers, one of whom was Joron, in the Fall of 1987. He believed that they

should have been distributed between December 1987 and February 1988. The distribution had no relationship to the Oakville store's restructuring.

19. At the store level Jacobs was aware that "we were to prepare our supervisors and Sales Managers to communicate" to the staff that unionized employees were to be told that the collective agreement took precedence. However, it was Human Resources' responsibility to do that. He said that Anne-Marie Jones told him that she had done that.

20. Anne-Marie Jones testified that she was told that Human Resources in the Oakville store would be responsible for adequate distribution of the pamphlets. They were distributed with the pay slips to all employees with a letter that makes no reference to the union. She met with the supervisors on July 4, 1988, gave them copies of the pamphlets, reviewed them with them, told them that the collective agreement took precedence where conflicts arose, and informed them the pamphlets would be given out on Friday, which was pay-day. The supervisors were told to tell any employee who asked that the collective agreement took precedence over the pamphlets.

21. Mr. Joron said that the matter of when an area is covered by the collective agreement as well as by the pamphlets should have been clarified at the time of distribution. He was not sure whether the bargaining unit employees had been told that the collective agreement superseded the pamphlets because he was not involved in the distribution at the store level and he had not suggested that the bargaining unit employees be told that.

22. The union argues that, through Mr. Joron and Mr. Crisp, the company has admitted that distributing the pamphlets to the unionized employees was a mistake. Furthermore, Crisp's instructions not to give them to the bargaining unit employees were not followed. There was no explanation given for this except that the communication lines were not clear. The union argues that this constitutes interference with the union's representation rights protected by section 64 because it makes it seem that the union did not exist. Further it argued that it is a contravention of section 67 because the company presented terms and conditions of employment to individual employees rather than to the union as their bargaining agent.

23. Further, the union argues that the distribution of the pamphlets was motivated by improper, anti-union considerations. There was no explanation from the store executives as to why they did not follow the upper management instructions.

24. The company argues that the pamphlets are not a violation of the Act just because they were distributed when there is no evidence of their application in contravention of the Act or the collective agreement. It argues that anti-union motive has not been shown either at the upper management level or at the store level. The supervisors were instructed that the collective agreement overrode the pamphlets. The company maintains that it is not credible that the store was willing to override the direct order of the Vice-President to get at the union and that in any event there is no evidence that the purpose of the pamphlets was to undermine the union. Rather the evidence indicates that the decision to distribute the pamphlets was company-wide and in a context of a very small percentage of the employees being unionized. It is argued that the effect on the union's representation rights is no different than the effect on the employee; it is acknowledged that the pamphlets might have been confusing but it is submitted that they would not have been applied in a manner contrary to the collective agreement because the company was well aware that the collective agreement took precedence. The employer also argued that this case is not a matter for the "non-motive" application of section 64 discussed in *International Wall Coverings* [1983] OLRB Rep. Aug. 1316. Given our view of the facts of this case, we agree that it does not involve a "non-motive" application of section 64 and it is therefore unnecessary to deal with this argument further.

25. It is not necessary to detail the extent to which the pamphlets conflict with the collective agreement. It is clear, and admitted by the company, that at least in the area of the grievance procedure, a fundamental portion of the collective agreement, the pamphlets outline a procedure that is not what was intended by the collective agreement. There are also conflicts in the areas of redundancy, job posting and the manner of establishing compensation. For example, the pamphlet entitled "Corporate Perspectives" says: "Rates of pay for individual positions will be determined on the basis of the evaluation of the value of the jobs to the company," with no reference to the collective bargaining process.

26. Section 64 protects a union from employer interference with its formation, selection, administration or representation of employees, subject to the reservation of the right of free speech to the employer, which was not argued as a defence in this case. The pamphlets were distributed with the employees' paychecks and as such were clearly intended to be brought directly to the attention of each and every employee as something significant from the employer.

27. Since the union is in no way precluded by the circulation of the pamphlets from exercising its rights under the collective agreement, for example to grieve, the company argues that the trade union's rights of representation or administration have not been interfered with. However, the only reason given by the employer for distributing the pamphlets without a disclaimer was the desire not to "raise questions which did not need to be raised." It is a reasonable inference from the context that part of this was an intention not to draw attention to the union and its collective agreements in the minds of either the unionized or the non-unionized employees. The union's interest in being recognized as the representative of the employees in the bargaining unit is a fundamental one. The fact that there was a gap between what Crisp intended (distribution to non-unionized employees only) and what occurred does not negate this intention. Rather, the fact that the company did distribute the pamphlets to the unionized employees leads to the reasonable inference that they intended the admitted effect of that distribution which would be to confuse the employees as to the nature of the union's representation of them. In this regard the absence of reference to the trade union and the presentation of material incorrect under the collective agreement has more than an incidental effect. For example, the pamphlet referring to the complaint procedure could well lead a reasonable employee to follow that complaint procedure rather than have contact with the trade union and follow the grievance procedure in the collective agreement with its strict time restrictions. Similarly, the pamphlets give a false picture of the manner in which compensation is set and thus serve to undermine the union's role as the exclusive bargaining agent. In these circumstances, we find there to be interference with the right of the trade union to represent the employees in the bargaining unit, contrary to section 64.

28. Given these findings, and the remedy set out below, it is unnecessary to deal with the union's allegations under sections 66, 67 and 70, and we therefore decline to do so.

29. In summary, the complaint is dismissed with regard to the promotion of the former Department Heads and allowed with regards to the Employee Safeguard Pamphlets. In remedy, we direct the employer to give to each bargaining unit employee a letter on a pay-day withdrawing the pamphlets to the extent that they conflict with the collective agreement, indicating that the union is their representative to bargain on their behalf regarding wages, benefits and conditions of employment, that the collective agreement takes precedence over the pamphlets and that the grievance procedure in the collective agreement must be followed by an employee grieving under the collective agreement, and to post a notice as attached for sixty days in a conspicuous place in the Oakville store where it is likely to come to the attention of the bargaining unit employees.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER TO THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING CONCERNING THE CIRCULATION OF THE "EMPLOYEE SAFEGUARDS" PAMPHLETS TO UNIONIZED EMPLOYEES DURING THE SUMMER OF 1988. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY SENDING THEM TO UNIONIZED EMPLOYEES WITH NO INDICATION THAT THE COLLECTIVE AGREEMENT TOOK PRECEDENCE, OR ANY ATTEMPT TO CLARIFY THAT UNIONIZED EMPLOYEES SHOULD FOLLOW THE GRIEVANCE PROCEDURE IN THE COLLECTIVE AGREEMENT (FOR GRIEVANCES CONCERNING THE COLLECTIVE AGREEMENT), RATHER THAN THE PROCEDURE SET OUT IN THE PAMPHLETS, AS WELL AS GIVING THE IMPRESSION THAT WAGES WERE SET UNILATERALLY BY THE COMPANY RATHER THAN IN NEGOTIATIONS WITH THE UNION.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF
A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.

WE WILL GIVE A LETTER TO EACH UNIONIZED EMPLOYEE
WITHDRAWING THE PAMPHLETS TO THE EXTENT THAT THEY CONFLICT
WITH THE COLLECTIVE AGREEMENT.

SIMPSON'S LTD.

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 15TH day of MAY, 1989.

2477-87-R Canadian Union of Public Employees, Applicant v. Governing Council of the University of Toronto, Respondent v. Group of Employees, Objectors

Certification - Practice and Procedure - Pre-Hearing Vote - Parties developing an alternative dispute resolution procedure to deal with 650 list challenges - Procedure submitted to the Board for its approval - Board approving of appointment of Vice-Chair under s.103(2)(h) to hear evidence and report back to the panel which will then make decisions based on the report - Rulings made by Vice-Chair are deemed to be the parties' settlements - Vice-Chair intended to be a dispute settling mechanism of "last resort"

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

APPEARANCES: *David Bloom*, *David Askew* and *Brian Sheehan* for the applicant; *W.J. Hayter*, *J. Parker* and *B. Marshall* for the respondent; *Betty Isbister* for the objectors.

DECISION OF THE BOARD; May 23, 1989

1. The Canadian Union of Public Employees ("C.U.P.E.") requested a pre-hearing representation vote in this application for certification with respect to certain employees of the Governing Council of the University of Toronto ("the University"). A vote was directed by the Board by decision dated March 31, 1988 and taken on April 25, 26 and 27, 1988; the ballot box was sealed pending challenges to the inclusion in the bargaining unit of a great number of persons, both under clause 1(3)(b) of the *Labour Relations Act* ("the Act") and on community of interest grounds. There have also been statements in opposition to the union filed; they themselves have no effect since this is a pre-hearing representation vote application, but the objecting employees who filed them do have party status in these proceedings.

2. C.U.P.E. and the University have developed what they term "an alternative dispute resolution procedure" ("the procedure") to deal with the challenges under clause 1(3)(b) of the Act (the challenges based on community of interest are the subject of a different procedure currently in effect). Because its implementation would involve the assistance of a Vice-Chair of the Board, the procedure was submitted to us for our approval. In a decision dated April 10, 1989, we indicated our general satisfaction with the proposed procedure but set out some specific concerns which we had with it and directed that a date be fixed when the parties could address those concerns. That hearing occurred on May 5, 1989, and it resolved all the concerns we had about the procedure.

3. Specifically, our concerns were alleviated and the procedure modified in the following way (the following paragraphs relate to the same numbered paragraphs in our April 10th decision):

1. We noted that the objecting employees were not party to the procedure. We directed that Notice of Hearing be sent to the representatives of the objecting employees along with a copy of the procedure. A representative of the objecting employees attended at the hearing and advised us that their interest was to be kept informed. She stated that they had no objection to the procedure developed by C.U.P.E. and the University and were content to leave the implementation of the procedure to those parties. We take her submissions to constitute an agreement to be bound by the resolution of the challenges arising out of the procedure. Counsel for C.U.P.E. and the University will ensure that the objecting employees' representative is copied with documents flowing between them unless all three parties reach some other agreement.
2. Paragraph 3 of the procedure has been deleted.

3. Paragraph 4 of the procedure provides for joint access to certain specified individuals and "such other persons as [C.U.P.E. and the University] may determine are necessary to be informed of all relevant facts". C.U.P.E. and the University confirmed that should they disagree on persons to be added, they would request the Vice-Chair appointed to assist them to resolve the dispute.
4. C.U.P.E. and the University confirmed that they anticipated they would have no role in the selection of a Vice-Chair to participate in the procedure.
5. C.U.P.E. and the University have appointed their own representatives to attempt to agree on the status of the disputed individuals. Their determination will be based on the Board's jurisprudence. (Our concern on this point effectively became moot with the deletion of paragraph 3 of the procedure.)
6. See paragraphs 5-8 of this decision below.
7. C.U.P.E. and the University do not expect to be able to select "representative" persons among the challenged individuals for the purposes of this procedure, nor do they anticipate conferring on the Vice-Chair the authority to require them to select such persons.
8. The procedure contemplates that C.U.P.E. may designate up to 5 persons whose status will be determined by this panel rather than through the procedure. The same "exemption" will apply to persons "elected or appointed to Governing Council, and who would otherwise be members of the bargaining unit". Such determinations are to be made (or may involve) full evidentiary hearings before this panel. Since the procedure states that such hearings will occur "unless the parties can otherwise agree", we will not direct that dates be set down for such hearings until one or more than one party so request.
9. The Vice-Chair is given authority by the procedure to terminate the procedure. C.U.P.E. and the University confirmed that a decision to terminate would constitute an agreement of the parties to terminate. The matter of the challenges would then come back before this panel.
11. [sic] C.U.P.E. and the University have established ground rules covering their own conduct in paragraph 14 of the procedure. They confirmed that that paragraph is not intended to encompass complaints before the Board.
12. Paragraph 15 of the procedure is deleted.

4. The representative of the objecting employees had no submissions to make on these issues and accepted the clarifications of and modifications to the procedure articulated by counsel for C.U.P.E. and the University.

5. The crux of the procedure from the Board's perspective is the involvement of a Vice-Chair in the process. The terms of the procedure envision the "appointment" by this panel under clause 103(2)(h) of the Act of a Vice-Chair upon whom the parties will "confer broad powers" and who will have the responsibility of making "expedited and binding decisions on the parties". Clause 103(2)(h) of the Act reads as follows:

103. ...

(2) Without limiting the generality of subsection (1), the Board has power,

...

(h) to authorize the chairman or a vice-chairman to inquire into any application, request, com-

plaint, matter or thing within the jurisdiction of the Board, or any part of any of them, and to report to the Board thereon;

• • • •

6. As we pointed out in our April 10th decision, while clause 103(2)(h) appears to give a broad scope of inquiry to the Vice-Chair so authorized, it does not appear to delegate the Board's decision-making authority to such a Vice-Chair. Rather, the Vice-Chair is given authority only to report back to the Board (that is, the panel authorizing him or her to make an inquiry); the Board then will make a determination or decision based on that report. The procedure as originally proposed does not appear to recognize this distinction; paragraph 7 of the procedure, perhaps inadvertently, seems to suggest that the Vice-Chair will have final authority to determine the issues in dispute (that is, the status of the disputed individuals). Specifically, paragraph 7 of the procedure provides that the Vice-Chair authorized by the Board to participate in the procedure will have

complete authority to determine hearing procedure and to resolve any disputes between the representatives that may arise from the implementation of this agreement, including the authority to finally determine the status of those persons who the representatives have been unable to agree on, based on the criteria established under section 1(3)(b). The Vice-Chair shall make binding oral rulings and shall not provide reasons in writing with respect to the status of disputed persons. The Vice-Chair shall also have the authority to review and monitor the progress of the representatives and to review and approve settlements agreed to by the representatives.

7. The oral submissions by C.U.P.E. and the University clarified their perception of the role of the Vice-Chair. It is their intention that any rulings by the Vice-Chair would become settlements of the parties which would then constitute the Vice-Chair's report to the panel (presumably, the Vice-Chair would also include other material in the report he or she considered pertinent to his or her inquiry). Counsel for C.U.P.E. analogized the procedure to the one which often occurs on Fridays, certification day at the Board. It is common for the parties to a certification to agree on whether persons in dispute under clause 1(3)(b) of the Act or on a community of interest basis are included in or excluded from the bargaining unit; only rarely does the Board question such settlements, although it always retains the right to do so and, as counsel suggested, the obligation to do so where the settlement on its face raises serious concerns. We agree that this approach satisfies both legal requirements relating to the Board's jurisdiction and the scope of the Vice-Chair's authority and the practical requirements of the parties in dealing with a large number of challenges as expeditiously as possible.

8. On the more fundamental question, we are satisfied that the procedure is one which can be carried out under clause 103(2)(h). In our view, we can authorize a Vice-Chair to inquire into the "matter" of the persons challenged in this application under clause 1(3)(b) of the Act. As part of his or her inquiry, the Vice-Chair is, in our view, free to engage in the process envisioned by the procedure: that is, to hear the parties' brief submissions (which we take to be, essentially, each party's "best case") and to making a ruling on the status of each person about whom submissions have been made. Such rulings are deemed to be the parties' settlements. Upon the completion of the procedure (or if considered appropriate by the parties and/or the Vice-Chair, at some point prior to the completion), the Vice-Chair will prepare a report of his or her inquiry which would be, in effect, a record of the settlements of the parties, but which might also contain other comments or findings considered appropriate by the Vice-Chair. The panel would then make the final determinations of the status of the disputed persons based on the Vice-Chair's report.

9. There are approximately 650 persons in dispute under clause 1(3)(b) of the Act. The parties do not intend the Vice-Chair to resolve all those persons in dispute; rather, the Vice-Chair will be a dispute settling mechanism of "last resort". Before calling on the Vice-Chair, the parties

will attempt to settle the status of as many of the persons in dispute themselves. They may seek the assistance of the Vice-Chair from time to time throughout their own process as they deal with specific groups of persons or specific departments of the University. We are advised that the parties are in fact making progress in resolving some of these disputes. The parties agree that they will to some extent have to accommodate their schedules to the Vice-Chair's other requirements at the Board.

10. Accordingly, pursuant to clause 103(2)(h) of the Act, we hereby authorize a Vice-Chair of the Board, to be designated by the Chair of the Board, to inquire into the status of the persons in dispute under clause 1(3)(b) of the Act, and to report back to this panel thereon upon termination of the procedure established by the parties as an "alternative dispute resolution procedure", either upon the completion of the process under the procedure or at some earlier time as determined by the parties and/or the Vice-Chair.

11. The Labour Relations Officers who have been examining disputed persons under a previous process agreed to by the parties (set out in our decision dated June 15, 1988) are directed to complete those examinations with respect to persons or positions about which examinations have commenced (see paragraphs 10 and 12 of the procedure), subject to the parties' adjourning the completion of those examinations.

0096-89-R Labourers' International Union of North America, Local 183, Applicant v. **Victor Carpentry Limited**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local Union 27, Intervener

Certification - Construction Industry - Pre-Hearing Vote - Respondent failing to meet with officer to make voting arrangements or to file any lists of employees - Intervener arguing that the list should not be finalized in the absence of the respondent and the respondent's records - Board refusing to convene a hearing on the issue - Vote ordered on the basis of the records of the applicant and available information - Ballot box sealed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Kobryn*.

DECISION OF THE BOARD; May 3, 1989

1. The applicant is a trade union within the meaning of section 1(1)(p) and 117(f) of the *Labour Relations Act*.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is made pursuant to section 144(3). As such, it does not relate to the industrial, commercial and institutional sector of the construction industry.

3. In accordance with the Board's usual practice in such applications, the Board (differently constituted in part), by decision dated April 17, 1989, authorized a Labour Relations Officer to examine the records of the applicant and the respondent and to confer with the parties with respect to the description and composition of the appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date for the purposes of the vote, and any other matters related to the applicant's entitlement to and arrangements

for the vote requested, and to report to the Board with respect thereto. An Officer convened a meeting of the parties on April 26, 1989.

4. The respondent has failed to file a reply, a list of employees or any other material, either within the time fixed therefore in accordance with the Act and the Board's Rules of Procedure or at all. Nor did any representative of the respondent appear at the meeting of the parties convened by the Officer. Consequently, the Board does not, at this point, have the benefit of the respondent's views or information with respect to this application.

5. At the meeting convened by the Officer on April 26, 1989, the intervenor took the position that the list of employees for this application should not be finalized in the absence of the respondent and the respondent's records, and purported to "reserve the right" to "amend" its position with respect to the list of employees and the vote arrangements. The applicant and the intervenor subsequently made written representations in this respect as well.

6. In its written representations, the intervenor asserts that it has had considerable difficulty in enforcing its bargaining rights with the respondent and that one result of this is that of the intervenor, through no fault or lack of diligence of its own, does not know where the respondent is working or who the respondent is employing. The intervenor submits that, in the circumstances, it cannot be expected to know who was employed by the respondent on the date of application in the bargaining unit with respect to which this application is made. The intervenor further submits that the Act requires that the applicant demonstrate an appearance of "membership evidence in respect to the persons in the bargaining unit" [sic], and that it would be pure speculation to assess the applicant's membership position in the absence of the respondent. Accordingly, submits the intervenor, the Board should not direct a pre-hearing vote in this case. Further, the intervenor submits that it is unfair and unreasonable to require it to finalize its position on the list of employees and that it is not possible to make suitable vote arrangements. The intervenor submits that the application should be dismissed or, in the alternative, that the Board ought to convene a hearing to hear argument on the issues raised.

7. In its written representations, the applicant submits that the Board should follow its practice of assessing the situation in matters like this on the basis of the information provided by the parties.

8. Section 9 of the *Labour Relations Act* provides that:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a the representation vote taken under subsection 7(2).

The Act permits an applicant for certification to request a pre-hearing representation vote. It is also evident from section 9 that a pre-hearing representation vote is intended to be just that: a vote conducted before any hearing is held to determine any issues in dispute (see *Kenting Earth Sciences*, [1985] OLRB Rep. Feb. 293; *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989). The purpose of the pre-hearing provisions of the Act is to provide an expeditious mechanism for the taking of a representation vote in an application for certification. That would not be achieved if the taking of the vote was delayed while one or more of the issues raised in the proceeding was adjudicated by the Board.

9. With respect to any issue regarding the applicant's entitlement to a pre-hearing vote, we note that section 9(2) contemplates that such a vote will be held where it *appears* that not less than thirty-five percent of the employees in the voting constituency were members of the applicant at the time the application was made, and section 9(4) contemplates that the applicant's actual entitlement to such a vote will be one of the issues determined *after* it has been taken. Further, we agree with and adopt the views expressed in *The Board of Education for the City of North York*, *supra*, at paragraphs 7 and 8, as follows:

7. The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which inevitably occurs when the conduct of a representation vote must await the determination of factual and legal issues which can only be resolved after a hearing in which each of the affected parties can participate. Often those disputed issues include the appropriate description of the bargaining unit, voter eligibility and employee status of challenged individuals. If the existence of such disputes could stand in the way of a pre-hearing vote, the procedure's efficacy would be destroyed. That is why the Legislature required only that the Board strike a voting constituency and prescribed as the vote prerequisite only that the applicant have the appearance of the requisite support within the voting constituency. (See generally *Emery Industries Limited*, [1980] OLRB Rep. March 316 at paragraphs 5, 6 and 7.) *Where determination of the actual prerequisites level of support depends on a resolution of contested factual or legal issues, the Board assesses the appearance of support on the assumption that the union's position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present.* The contested issues are dealt with after the vote is held. However, the results of a pre-hearing vote are of no effect unless it is later demonstrated that not less than 35 per cent of the persons ultimately found to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant's favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting at all, or any, of the ballots.

8. As access to the pre-hearing vote procedure is a function of the matters of fact and law put in issue by the parties, there is a risk that frivolous allegations and arguments may be made. The same risk exists whenever entitlement to launch and prosecute proceedings depends only on the assertion of a *prima facie* case. However, a trade union which gains access to the process by asserting unfounded and frivolous allegations and arguments only does itself harm. If it cannot ultimately demonstrate that it had the requisite support, it will never know how many ballots were cast in its favour, because unless the requisites of subsection 9(4) are met, there will be no reason to unseal the ballot box. The application having been pressed past the meeting with the officer, dismissal of the application will normally carry with it a bar imposed under section 103(2)(i). If it becomes apparent to the Board that the assertions which led to the vote were frivolous when made, then the Board may take that into account in determining the length of the bar.

[emphasis added]

We also note that it is particularly important to test the question of representation quickly in applications for certification in the construction industry because of the generally more transient nature of employment in it.

10. In our view, there is nothing in the Act which requires the Board to somehow force a respondent to an application for certification in which a pre-hearing vote has been requested to either file a list of employees or otherwise "take a position" with respect thereto. Nor is the applicant, or any other party, in any worse position that it would be in an application in which no pre-hearing vote is requested and in which the respondent employer has failed to file any material or otherwise take a position with respect to the list of employees.

11. In the result, any having regard to the purpose and provisions of section 9 of the Act, and to the Board's practice of holding a hearing with respect to all matters arising out of and incidental to an application for certification in which a pre-hearing vote has been requested after that vote is taken, we are satisfied that there is nothing in the circumstances of this application which makes it necessary or appropriate to hold a hearing prior to the taking of the pre-hearing vote requested.

12. Upon examining the records of the applicant and assessing the information available, and assuming, without finding, that the applicant's position with respect to the issues in dispute is correct, it appears to the Board that not less than thirty-five percent of the employees of the respondent in the voting constituency described below were members of the applicant at the time the application was made.

13. Consequently, and having regard to the agreement of the applicant and intervener, the Board directs that a pre-hearing representation vote be taken in the following voting constituency:

all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in Board Area 8, save and except non-working foremen and persons above the rank of non-working foreman.

14. All persons employed in the voting constituency on April 25, 1989 who are so employed on the date the vote is taken will be eligible to vote.

15. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

16. In the circumstances, the Board directs that ballots cast by any person whose right to vote is challenged by any party be segregated and further that the ballot box be sealed until further order of the Board.

17. This matter is referred to the Registrar for the purposes of taking the pre-hearing representation vote. The Registrar is further directed to schedule this application for hearing after the vote is taken for the purpose of hearing the evidence and representations of the parties with respect to all matters arising out of and incidental to it.

2018-88-U (Court File No. 83/89) United Steelworkers of America, Applicant v. Sabina Citron, Citron Automotive Division of Plaza Fiberglas Manufacturing Limited, Plaza Electroplating Limited, Citcor Manufacturing Ltd., and the Ontario Labour Relations Board, Respondents

Contempt - Evidence - Stated Case - Witness - Principal of respondent refusing to produce employment forms without covering over personal information - Union stating case to Divisional Court - Refusal without lawful excuse - Conduct of principal constituting contempt notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on good behaviour

Board decision found at [1989] OLRB Rep. May 479.

High Court of Justice, Divisional Court, Callaghan, Saunders and Gray JJ., May 1, 1989:

Callaghan A.C.J.H.C. (orally): This is an application by the United Steel Workers of America, pursuant to section 13 of the *Statutory Powers Procedure Act*, R.S.O. 1980 c. 484, as amended ("S.P.P.A.").

The application was initially before this court on March 31st last, as a result of the refusal of the respondent, Mrs. Sabina Citron, to produce certain documents in proceedings before the Ontario Labour Relations Board, in breach of her own undertaking and in breach of the Board's order to produce such documents. On that occasion, this Court entertained argument on whether or not Mrs. Citron had acted with lawful excuse. Evidence was not called on that occasion, as we concluded that the question of lawful excuse was a question of law for the court, and after deliberating on the matter and hearing argument, we were satisfied that her refusal had been without lawful excuse, and so stated in our disposition of the matter.

On that occasion, while we probably could have dealt finally with the matter, we indicated in our endorsement that we felt it would be unjust to do so. Mrs. Citron did not have the benefit of our ruling when she initially refused to produce the documents sought. The Labour Relations Board, pursuant to our endorsement, reconvened this matter on April 25th, 1989. On that occasion, Mrs. Citron was called before the Board and the Board's reasons for judgment, with reference to that hearing, conclude as follows:

"Mrs. Citron then took the witness stand and after confirming that what Mrs. Citron had been directed to produce were the application forms for Citcor without the addresses, telephone numbers and social insurance numbers covered over, I gave her a further opportunity, as directed by the Divisional Court, to produce the application forms in their entirety. Mrs. Citron once again refused to produce the documents in that form."

The matter therefore returns to this Court, on the motion of the applicant, to cite Mrs. Citron for contempt on the basis that she had no lawful excuse to refuse to produce the documents before the Ontario Labour Relations Board on April 25, 1989.

It has been urged upon us by Mrs. Citron's counsel that no finding should be made against her as, on April 28, 1989, on the advice of counsel, Mrs. Citron produced the documents to the Board or counsel for the Board. The position has been taken in argument before us that the contemner, having purged her contempt, should not now be convicted for contempt and that the purpose of s. 13 is coercive and not punitive.

Mrs. Citron apparently has applied for leave to appeal to the Court of Appeal from the judgment of this Court of March 31, 1989. If there is any misunderstanding as to the position of the Divisional Court with reference to that application, we simply point out that on March 31, last, this Court adjourned the matter *sine die*, and we are completing it today. This hearing is in no way meant to disregard the jurisdiction of the Court of Appeal.

On this application, Mrs. Citron submits that she has to protect the addresses of employees whose names, in her view, are not relevant. Mrs. Citron submits she had a genuine concern for the safety of employees and their families due to threats which have been reported to her.

Having listened to Mrs. Citron, we are not prepared to accept that she acted *bona fide* in this matter. We note that she was before this Court on April 14, 1986, on a similar application. On that occasion the Divisional Court stated:

"We think the facts show conclusively that the company has embarked on a course of action that was intended deliberately to delay and frustrate the certification procedures established by the Board."

We are of the view that similar conduct has taken place on this occasion, and the conclusion this Court on that occasion is equally appropriate today. We note further that the Divisional Court on that occasion stated at page 4 of the judgment:

"Those directions must be complied with promptly if justice is to be done in this field, and employers must be disabused of any notion that they can purchase delays in the certification process by breaking the law at the price only of paying token fines that are negligible in relation to the size of their resources."

It was argued before us that cases such as *Re Tilco Plastics Ltd. v. Skurjat et al.*, [1966] 2 O.R. 547 (H.C.), Appeal to the Court of Appeal Dismissed, [1967] 2 C.C.C. 196 were not applicable, as there was no public defiance and that it was basically a private dispute between a company and a union. In our view, the directions of the Ontario Labour Relations Board create a public interest, and this matter is not simply a private dispute between a company and its union. When that Board issues directions, it issues them pursuant to the authority of the Legislature of this province. Those directions, in the absence of lawful excuse, must then be complied with. As indicated on March 31st last, we concluded that Mrs. Citron acted without lawful excuse.

We note that the Ontario Court of Appeal in *Re Ajax & Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1981), 132 D.L.R. (2d) 270 at p. 284 dealt with the question of subsequent compliance with Board orders and noted that compliance by a union and its members with the Board's order does not have the effect of rendering prior acts of disobedience moot questions. That applies equally in this case where the order of the Board, after being confirmed by this Court, has been belatedly complied with in a grudging manner.

The Court of Appeal in the *Ajax & Pickering General Hospital* case also indicated that, in the field of labour relations, the settlement of a labour dispute does not deprive the Court of power to consider the effect of previous acts of disobedience. It is on that basis that we have considered the past conduct of Mrs. Citron and the past relationship with the related companies and her union.

With the aforementioned in mind, we reject the submission that this is a private dispute, and we state emphatically that it is a public matter. We are satisfied that the conduct of Mrs. Citron constitutes contempt notwithstanding her subsequent compliance.

It now remains for us to dispose of this matter. We must apply the relevant principles of sentenc-

ing. First, we look at the individual. While motivated out of alleged principle, she does have a past history of unfortunate labour relations. That is relevant because, on the earlier occasion referred to above, this Court imposed a fine upon Mrs. Citron and her companies and apparently that had no effect. Consequently, it would appear a monetary penalty is not effective in obtaining her compliance with lawful directions of the Labour Relations Board.

Second, we must look to the matter of deterrence. Based on her past conduct, deterrence is relevant not only insofar as she as an individual is concerned, but it is relevant insofar as the concept of general deterrence is concerned. That is, all persons dealing with the Labour Relations Board must realize that the directions and orders of that Board must be complied with, unless there is lawful excuse not to do so. As we have indicated, there was no lawful excuse in this case.

In all, deterrence is of significant importance in this case and it is a matter we must weigh when assessing the appropriate penalty. The Board has a legitimate and vital authority that must be obeyed, and those who would ignore it must be prepared to pay that penalty. We would have been influenced, of course, by an apology or an expression of remorse. None was forthcoming in today's proceedings. Mrs. Citron has had every opportunity to apologize to this Court for her conduct in relation to refusing to comply with the order of this Court on April 25th, and for her conduct in refusing to comply with any orders of the Board. That also is a matter we must take into consideration.

We then come to the most difficult aspect of the sentencing. This contemner has purged her contempt by belatedly and, as I said before, grudgingly complying with the order of this Court. However, we are not satisfied that she did this on her own, as the evidence is that she did it on the advice of counsel. As indicated above, we think that it was part of a deliberately intended delaying tactic. Cases have been cited, by judges much revered, which indicate that when the contemner purges contempt that should put an end to the placing of personal liberty in jeopardy. However, as indicated, the public interest requires compliance with the orders of the Ontario Labour Relations Board and it is important that those who wilfully embark upon a course such as taken by Mrs. Citron in this case must recognize that the penalty of imprisonment is alive and available to the Court.

We have given very serious consideration as to what we should do with Mrs. Citron. Our finding of contempt places upon her a criminal record of sorts, which I think she will have difficulty living with. Her conduct, in our view, warrants a sentence of 30 days' in jail. We have given this matter our very best consideration and have concluded that in the interests of justice, however, that the 30 days' sentence should be suspended.

Mrs. Citron, stand up. We sentence you to 30 days in jail. In the circumstances, however, we are suspending that sentence upon you being of good behaviour for that period of time. We are awarding costs to the respondent union on a solicitor and client basis.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1207-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Calvano Lumber & Trim Co. Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except office, clerical and sales staff, foreman and persons above the rank of foreman" (2 employees in unit)

0888-88-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Belstone & Goff Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1119-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Bonik Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1469-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Kraft Construction Company (1978) Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors, in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1943-88-R: United Steelworkers of America (Applicant) v. Stevens Controls (1987) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Renfrew, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, students employed on a cooperative work team program, quality

inspector, and students employed during the school vacation period” (43 employees in unit) (*Having regard to the agreement of the parties*)

2023-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. C & W Asphalt Paving Company of Wallaceburg Ltd. (Respondent)

Unit: “all construction labourers and employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2050-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Speyside General Contracting (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2218-88-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. London Salvage & Trading Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office and sales staff” (27 employees in unit) (*Having regard to the agreement of the parties*)

2384-88-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. London Free Press Printing Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent employed in its Editorial Department, save and except Editor, Managing Editor, Assistant Managing Editor (news), Administrative Editor, Editorial Page Editor, Ombudsman, News Editor, Business Editor, City Editor, Editor News Design, Chief Photographer, Art Director, Sports Editor, Our Times Editor, Saturday Editor, Region Editor, Assignment Editor, Librarian, employees exercising managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*, one secretary to each of the editor, the Managing Editor, the Assistant Managing Editor and the Editorial Page Editor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, interns while enrolled in a post secondary journalism course and high school students on a co-operative training program” (128 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent regularly employed in its Editorial Department for not more than 24 hours per week, students employed during the school vacation period and interns while enrolled in a post secondary journalism course, save and except Editor, Managing Editor, Assistant Managing Editor (news), Administrative Editor, Editorial Page Editor, Ombudsman, News Editor, Business Editor, City Editor, Editor News Design, Chief Photographer, Art Director, Sports Editor, Our Times Editor, Saturday Editor, Region Editor, Assignment Editor, Librarian, employees exercising managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*, one secretary to each of the editor, the Managing Editor, the Assistant Managing Editor and the Editorial Page Editor, and high school students on a co-operative training program” (21 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2633-88-R: The Newspaper Guild (Applicant) v. The Nugget, A Division of Southam Inc. (Respondent)

Unit #1: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Unit #2: “all employees of the respondent in the Province of Ontario, save and except employees in the production department, persons exercising managerial functions or employed in a confidential capacity in matters

relating to labour relations within the meaning of section 1(3)(b) of the *Labour Relations Act*, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (58 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2639-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Centre Park Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2647-88-R: Ironworkers District Council of Ontario (Applicant) v. Torbram Installations Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2698-88-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Don Valley Brewing Company Ltd. c.o.b. as Connors Brewery (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

2804-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. VS Services Ltd. (Respondent) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local No. 647, affiliated with the I.B. of T., C., W. & H. of A. (Intervener)

Unit: “all employees of VS Services Ltd. at CAMI Automotive Inc. at Ingersoll, Ontario, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2815-88-R: Ontario Nurses’ Association (Applicant) v. St. Patrick’s Home of Ottawa (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Ottawa, save and except Director of Nursing and persons above the rank of Director of Nursing” (17 employees in unit) (*Having regard to the agreement of the parties*)

2834-88-R: Canadian Union of Public Employees (Applicant) v. The Geraldton & District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the Town of Geraldton, save and except supervisors, persons above the rank of supervisor, confidential secretary/bookkeeper, and persons regularly employed for not more than 24 hours per week” (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the Town of Geraldton regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor, and confidential secretary/bookkeeper” (7 employees in unit) (*Having regard to the agreement of the parties*)

2852-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Stone & Webster Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial commercial and institutional sector engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2861-88-R, 2862-88-R, 2965-88-R: International Union of United Plant Guard Workers of America, Local 1962 (Applicant) v. The Sisters of St. Joseph of the Diocese of Toronto in Upper Canada (Respondents)

Unit #1: "all security guards in the employ of the respondent at its health care facilities in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

2911-88-R, 2912-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Oakes Mechanical Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

2939-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lonco Construction Ltd.; Caradon Developments Inc. (Respondents)

Unit: "all construction labourers in the employ of Lonco Construction Ltd. in the Industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Lonco Construction Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2964-88-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Westcan Electric Heating Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (122 employees in unit) (*Having regard to the agreement of the parties*)

2979-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hart Chemical Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Guelph, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, security guards and students employed during the school vacation period" (42 employees in unit) (*Having regard to the agreement of the parties*)

3030-88-R: Amalgamated Transit Union, Local 1320 (Applicant) v. The Corporation of the City of Peterborough (Respondent)

Unit: "all employees of the respondent regularly employed on a part-time or interim basis as operators, mechanics, greasers and vehicle service personnel in the public transit service, save and except The Canadian Union of Public Employees Local 504; Peterborough Civic Employees; Canadian Labour Congress; and the Canadian Union of Public Employees Local 126; The Peterborough City Hall Employees Union; Employees who are full-time Fire Fighters and covered by the Fire Department Act; Employees of The Board of Commissioners of Police, including Policemen and Police Matron(s); nurses, employees of Fairhaven Home for Senior Citizens; superintendents, general foremen, heads of departments; deputy heads of departments; pro-

fessional engineers; and those supervisory personnel which the Employer and the Union may agree from time to time exercise managerial functions" (11 employees in unit) (*Having regard to the agreement of the parties*)

3043-88-R: Ironworkers District Council of Ontario (Applicant) v. Cana Construction Co. Ltd. (Respondent)

Unit: "all rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all rodmen in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3055-88-R: Christian Labour Association of Canada (Applicant) v. Heritage Living Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except registered and graduate nurses, administrator, persons above the rank of administrator and office and clerical staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

3059-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Barrincorp Industries Inc. (Respondent)

Unit: "all employees of the respondent at its Dominion Automotive Industries Division in the Township of Uxbridge, save and except foremen, persons above the rank of foreman, office, sales and technical staff, and engineers" (123 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3046-88-R: Service Employees' International Union, Local 532 Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Canadian Red Cross Society, Ontario Division (Respondent)

Unit: "all employees of the respondent in the Town of Dundas, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

3071-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. Steep Rock Resources Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Bathurst, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory technicians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (37 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3082-88-R: Canadian Union of Public Employees (Applicant) v. The Woodstock Public Library Board (Respondent)

Unit: "all employees of the respondent in Woodstock, save and except chief Librarian, persons above the rank of chief librarian, curator of the Art Gallery, confidential secretary-bookkeeper and persons regularly employed for not more than 24 hours per week" (15 employees in unit) (*Having regard to the agreement of the parties*)

3092-88-R: The Association of Allied Health Professionals: Ontario (Applicant) v. The Board of Health of the Elgin-St. Thomas Health Unit (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all paramedical employees of the respondent in the County of Elgin, save and except supervisor, and employees for whom any trade union held bargaining rights as of March 15, 1989" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3097-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Brian Chevrolet Oldsmobile Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Welland, save and except foreman, persons above the rank of foreman, office and sales staff" (21 employees in unit) (*Having regard to the agreement of the parties*)

3102-88-R: International Union of United Plant Guard Workers of America, Local 1962 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

Unit: "all security guards of the respondent at Aetna Canada Centre in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

3103-88-R: International Union of United Plant Guard Workers of America, Local 1962 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

Unit: "all security guards of the respondent at Aetna Canada Centre in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

3104-88-R: Canadian Paperworkers Union (Applicant) v. Hemiwood Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Atikokan, save and except foremen, persons above the rank of foreman, office and sales staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

3108-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Chrysler Credit Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees employed by the Canadian Accounting Department of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor" (13 employees in unit) (*Having regard to the agreement of the parties*)

3123-88-R: Ontario Public Service Employees Union (Applicant) v. Brant County Ambulance Service Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Brantford and the Town of Paris, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the City of Brantford and the Town of Paris, save and except supervisors, persons above the rank of supervisors" (2 employees in unit) (*Having regard to the agreement of the parties*)

3128-88-R: Service Employees' Union, Local 210 Affiliated with Service Employees' International Union, AFL-CIO:CLC (Applicant) v. Auxiliary of Windsor Western Hospital Centre - I.O.D.E. (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

3129-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. U-Tec Welding & Fabricating Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff" (40 employees in unit) (*Having regard to the agreement of the parties*)

3155-88-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Board of Governors of Exhibition Place (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, save and except electrical section head, persons above the rank of electrical section head” (8 employees in unit) (*Having regard to the agreement of the parties*)

3158-88-R: United Steelworkers of America (Applicant) v. Snap-On Tools of Canada Ltd. (Respondent)

Unit: “all employees of the respondent at its Coatings Division in the City of Brantford, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (38 employees in unit) (*Having regard to the agreement of the parties*)

3171-88-R: Service Employees Union, Local 183 (Applicant) v. 604853 Ontario Ltd., c.o.b. as Hillsdale Retirement Home (Respondent)

Unit: “all employees of the respondent in the Town of Campbellford, save and except supervisors and persons above the rank of supervisor” (10 employees in unit) (*Having regard to the agreement of the parties*)

3183-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Tavares & Gomes Construction (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

3196-88-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Muskoka Board of Education (Respondent)

Unit: “all professional support staff of the respondent employed as psycho-education consultants, psychometrists, speech language pathologists and attendance counsellors, save and except supervisors, and employees for whom any trade union held bargaining unit rights as of March 28, 1989” (4 employees in unit) (*Having regard to the agreement of the parties*)

3206-88-R: Service Employees’ Union, Local 268 Affiliated with the S.E.I.U., AF of L, CIO, & CLC (Applicant) v. Trizec Equities Ltd. (Respondent)

Unit: “all office and clerical employees of the respondent at its Central Park Lodges Division in the City of Thunder Bay employed for not more than 22 2= hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, physiotherapists, occupational therapists and any employees in bargaining units for which any trade union held bargaining rights as of March 29, 1989” (6 employees in unit) (*Having regard to the agreement of the parties*)

3207-88-R: Teamsters, Local No. 419 (Applicant) v. Nestlé Enterprises Ltd. (Respondent)

Unit: “all employees of the respondent in its Nestlé Food Service Division in Stoney Creek, save and except branch manager, those above the rank of branch manager, office and sales staff and students employed during the school vacation periods” (8 employees in unit) (*Having regard to the agreement of the parties*)

3220-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. B. Maskell Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and those engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0032-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. A.S.L. & Associates Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0034-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Terrier Excavating Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0070-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Girfab Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2373-88-R: Independent Canadian Transit Union (Applicant) v. Olympia & York Developments Ltd. (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all mechanical maintenance employees engaged in the maintenance services and plant operations at Olympia & York Developments Limited, L'Esplanade Laurier, save and except assistant superintendent, persons above the rank of assistant superintendent, office staff, persons regularly employed for not more than 24 hours per week and students hired for the school vacation period" (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	0

2457-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bourque Consumer Electronics Service Inc. (Respondent) v. Aerospace & Electronic Communications Employees' Association (RCA-SPAR) (Intervener)

Unit: "all employees of the respondent in Downsview, save and except supervisors, administrators, managers, persons above the rank of supervisor, administrator or manager, sales representatives, contract sales representatives, promotion representatives, technical representatives, professional engineers, accountants, field merchandisers, A&R Co-ordinator, secretaries to vice-president, secretaries to managers reporting directly to a vice-president or the President, students employed during the school vacation period and all employees

employed at the Corporate head office currently located at the Royal Bank Plaza, City of Toronto" (18 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	3

2774-88-R: Independent Canadian Transit Union (Applicant) v. Riverside Hospital of Ottawa (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all employees of the respondent, save and except professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, supervisors, persons above the rank of supervisor" (181 employees in unit)

Number of names of persons on list as originally prepared by employer	180
Number of persons who cast ballots	51
Number of ballots marked in favour of applicant	51
Number of ballots marked in favour of intervener	0

2778-88-R: Independent Canadian Transit Union (Applicant) v. Saint-Vincent Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Interveners)

Unit: "all stationary engineers and helpers in the employ of the power plant of the respondent at its hospital in Ottawa, save and except the chief engineer" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

2823-88-R: Independent Canadian Transit Union (Applicant) v. Modern Building Cleaning Inc. (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all employees of Modern Building Cleaning Inc., at the Elizabeth Bruyere Health Centre, Ottawa, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	20
Number of ballots marked in favour of intervener	0

2909-88-R: Independent Canadian Transit Union (Applicant) v. The Salvation Army Grace General Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "the Maintenance Engineer, all electrician(s) stationary engineers, and helpers employed by the respondent save and except supervisors, persons above the rank of supervisors, and persons in the bargaining units for which any trade union other than the Canadian Union of Operating Engineers & General Workers held bargaining rights as of February 20, 1989" (8 employees in unit)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0

2952-88-R: Independent Canadian Transit Union (Applicant) v. Winchester District Memorial Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all stationary engineers employed by Winchester District Memorial Hospital, at Winchester, Ontario, save and except chief engineers and persons above the rank of chief engineer" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2142-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Silverwood Structures Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on list as originally prepared by employer	1
Number of persons who cast ballots	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	0

2633-88-R: The Newspaper Guild (Applicant) v. The Nugget, A Division of Southam Inc. (Respondent)

Unit #1: "all employees of the respondent in its production department in the province of Ontario, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the *Labour Relations Act*, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	29
Number of persons who cast ballots	30
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	25
Number of segregated ballots cast by persons whose names appear on voters' list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	6
Ballots segregated and not counted	4

Unit #2: (see *Bargaining Agents Certified Without Vote*)

Applications for Certification Dismissed Without Vote

2620-88-R: United Steelworkers of America (Applicant) v. Star Chrome Manufacturing Ltd. (Respondent) (37 employees in unit)

2861-88-R, 2862-88-R, 2965-88-R: International Union of United Plant Guard Workers of America, Local 1962 (Applicant) v. The Sisters of St. Joseph of the Diocese of Toronto in Upper Canada (Respondents) (8 employees in unit) (Unit #2 Dismissed)

2921-88-R: Ontario Public School Teachers' Federation (Applicant) v. The Norfolk Board of Education (Respondent) (92 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2419-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Tridon Ltd. (Respondent) v. Tridon Employees' Union (Intervener)

Unit: "all employees of the company employed by Tridon, save and except assistant supervisors, supervisors, office and clerical staff, sales staff, technical staff, quality control staff and students employed during the school vacation period" (476 employees in unit)

Number of names of persons on list as originally prepared by employer	473
Number of persons who cast ballots	419
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	126
Number of ballots marked in favour of intervener	288
Ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1369-88-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Woodstock & District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the County of Oxford, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit)

Number of names of persons on list as originally prepared by employer	44
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	26

Unit #2: "all employees of the respondent in the County of Oxford regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (21 employees in unit)

Number of names of persons on list as originally prepared by employer	32
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	7

2747-88-R: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Applicant) v. Qualitech Manufacturing & Engineering Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Waterloo, save and except foremen, persons above the rank of foreman, office and sales staff" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	36
Number of persons who cast ballots	31
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	30
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	18
Ballots segregated and not counted	1

2928-88-R: Energy & Chemical Workers Union (Applicant) v. Koch Automotive Products Company (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Georgetown save and except supervisors, persons above the rank of

supervisor, office, sales staff and laboratory employees" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	18
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	11

2961-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Glen White Industries Ltd. (Respondent) v. Steelway Employee Association (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Steelway Building Systems Division in the Township of Yarmouth in the County of Elgin, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff" (78 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	63
Number of persons who cast ballots	62
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	32

Applications for Certification Withdrawn

2883-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Aspen Aluminium Ltd. (Respondent)

2908-88-R: International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. The Board of Education for the City of Windsor (Respondent)

2941-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Cedarvale Woodworking Ltd. (Respondent)

3020-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. N. I. Wheels (Respondent)

3047-88-R: Ironworkers District Council of Ontario (Applicant) v. George Armstrong Co. Ltd. (Respondent) v. Teamsters, Local 990 (Intervener)

3079-88-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Board of Education (Respondent) v. Service & Commercial Employees Union, Local 272 (Intervener)

3088-88-R: Union of Labour Representatives of Ontario (Applicant) v. Brotherhood of Maintenance of Way Employees (Respondent)

3107-88-R: Service Employees Union, Local 478 (Applicant) v. Leisureworld Inc. (Respondent)

3117-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Victor Carpentry Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener)

3146-88-R: International Association of Machinists & Aerospace Workers (Applicant) v. Cusco Fabricators Ltd. (Respondent) v. Group of Employees (Objectors)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1316-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Westroyal Carpentry Ltd., and R.E.D.G. Construction Ltd. (Respondents) (*Withdrawn*)

1655-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Inverleigh Construction Ltd. and Milton Bridge Ltd. (Respondent) (*Withdrawn*)

2237-88-R: Toronto Typographical Union, Local 91 (Applicant) v. Fleet Typographers Ltd., Continental Typesetting Ltd. and The Type Case Inc. (Respondents) (*Dismissed*)

2566-88-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Future Care Ltd. and Kuco Construction Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

1655-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Inverleigh Construction Ltd. and Milton Bridge Ltd. (Respondent) (*Withdrawn*)

2316-88-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837 (Applicants) v. Currie Products Ltd. and Peat Marwick Ltd. (Respondents) (*Withdrawn*)

2237-88-R: Toronto Typographical Union, Local 91 (Applicant) v. Fleet Typographers Ltd., Continental Typesetting Ltd. and The Type Case Inc. (Respondents) (*Dismissed*)

2566-88-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Future Care Ltd. and Kuco Construction Ltd. (Respondents) (*Granted*)

2714-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Rose Cafe & Lounge at The Rosetown Inn (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

1965-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Melnor Manufacturing Ltd. (Respondent) (*Granted*)

2068-88-R: Millworkers, Local #802 - United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tecumseh Builder's Square (Respondent) (*Withdrawn*)

2583-88-R: United Steelworkers of America (Applicant) v. R & R Trucking Association (Respondent) (*Granted*)

3112-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Gilbarco Canada Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0007-87-R: Fred Dawson (Applicant) v. United Steelworkers of America (Respondent) (204 employees in unit) (*Granted*)

2055-88-R: Pierre Greügoire (Applicant) v. United Steelworkers of America, Local 8327 (Respondent) v. Fildebrandt Precision Industries Ltd. (Intervener)

Unit: "all permanent production employees of Fildebrandt Precision Industries Limited in the City of Kanata, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, numerical control programmer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Granted*)

Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	12

2637-88-R: John McGuire (Applicant) v. International Association of Machinists & Aerospace Workers, Local Lodge 235 (Respondent) v. McCleave Truck Sales Ltd. (Intervener)

Unit: "all employees of the intervener at its Lenworth Truck Sales and Service Centre in Mississauga, save and except foremen, persons above the rank of foreman, and office and sales staff" (21 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	5

2764-88-R: All Housekeeping Staff, Journeys End Motels (Applicant) v. Hotel Employees Restaurant Employees Union (Respondent) (9 employees in unit) (*Dismissed*)

2787-88-R: Lorne Day, Bill Crim and Michael Fadel (Applicants) v. Triple A Union of Drivers & General Workers (Respondent) v. Amcon Management Inc. (Intervener) (*Withdrawn*)

2930-88-R: Bill Lavigne, Steve Hunter, Barbara Reid, Gloria Black and Bob Bieniaz (Applicants) v. Teamsters, Chemical, Energy & Allied Workers, Local 424 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) (9 employees in unit) (*Dismissed*)

3057-88-R: Sam S. Vucinic (Applicant) v. Millworkers, Local 802, United Brotherhood of Carpenters & Joiners of America (Respondent) (*Withdrawn*)

3075-88-R: Gerry Lees Building Materials Ltd., c.o.b. as Beaver Lumber (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) (7 employees in unit) (*Granted*)

3073-88-R: Robert A. Wallace (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Town of Palmerston (Intervener) (4 employees in unit) (*Dismissed*)

3083-88-R: Enrico Sebastiani (Applicant) v. Labourers' International Union of North America, Local 247 (Respondent) v. M. Corsi Construction Ltd. (Intervener) (4 employees in unit) (*Granted*)

3126-88-R: John Looman (Applicant) v. Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Moffatt & Powell Ltd. (Intervener) (*Withdrawn*)

3159-88-R: Graham Marshall (Applicant) v. United Steelworkers of America (Respondent) v. Hamilton Kent of Canada Ltd. (Intervener) (15 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3119-88-U: Wickes Manufacturing Company Ltd. (Applicant) v. Jim Martin, Thomas Forrest, Jack Phillip, Henry Roznawski, Dave Potvin and Ray LeBlanc (Respondents) (*Withdrawn*)

0120-89-U: Council of Printing Industries of Canada on behalf of Empress Graphics Inc. (Applicant) v. Graphic Communications International Union, Local 500M, Lithographers, Mike R. Zajac, Earl McDonnell and Cliff Robinson (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2803-86-U: Balford Lindsay (Complainant) v. Canadian Auto Workers Union, Local 1451 (Respondent) v. Budd Canada Inc. (Intervener) (*Dismissed*)

0393-87-U: Carl Oezhan (Complainant) v. United Steelworkers of America, Local 6500 and Inco Metals Ltd. (Respondents) (*Dismissed*)

0192-88-U, 0241-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ronal Canada Inc. (Respondent) (*Dismissed*)

1445-88-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Omstead Foods Ltd. (Respondent) (*Withdrawn*)

1578-88-U: Paul E. Carreau (Complainant) v. Amalgamated Transit Union & Amalgamated Transit Union, Local 113 (Respondents) (*Withdrawn*)

1702-88-U: Acoustical Association Ontario (Complainant) v. Ontario Painting Contractors Association, Interior Systems Contractors Association Ontario, International Brotherhood of Painters & Allied Trades Employer Bargaining Agency, and International Brotherhood of Painters & Allied Trades, Local 1891 and The Ontario Council of the International Brotherhood of Painters & Allied Trades (Respondents) (*Withdrawn*)

1723-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. Apollo 8 Maintenance Services Ltd.; Bank of Nova Scotia; Campeau Corporation (Respondents) (*Withdrawn*)

1794-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Food City (Oshawa Group) Mr. G. Callis, Mr. G. Oswell and Ms. one Krouchuk (Respondents) (*Withdrawn*)

2070-88-U: Ontario Public Service Employees Union (Complainant) v. Fanshawe College (Respondent) (*Withdrawn*)

2083-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation #469 (Respondent) (*Withdrawn*)

2095-88-U: Allan Rothead (Complainant) v. The Corporation of the City of Hamilton and Canadian Union of Public Employees, Local 5 (Respondents) (*Withdrawn*)

2097-88-U: Adriano Ricco (Complainant) v. Toronto General Hospital and Richard Rolex (Respondents) (*Withdrawn*)

2125-88-U: Dan O'Connell (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW) and Local 1285 (American Motors Brampton Plant Unit) (Respondent) v. Chrysler Canada Ltd. (Intervener) (*Withdrawn*)

2318-88-U: Labourers' International Union of North America, Local 837 (Complainant) v. Peat Marwick Ltd. and Currie Products Ltd. (Respondents) (*Withdrawn*)

2377-88-U: Ontario Nurses' Association (Complainant) v. Victorian Order of Nurses, Sault Ste. Marie Branch (Respondent) (*Withdrawn*)

2414-88-U: Professor Uday Singh (Complainant) v. Board of Governors of Laurentian University, Sudbury, Ontario (Respondent) v. Laurentian University Faculty Association (Intervener) (*Dismissed*)

2435-88-U: United Paperworkers International Union, AFL:CIO:CLC (Marc Scott, International Representative) (Complainant) v. Niagara Paper Company (Respondent) (*Withdrawn*)

2565-88-U: William Egan (Complainant) v. The Bulger Group of Companies, David N. Harvey - President (Respondent) (*Withdrawn*)

2579-88-U, 2933-88-U: London & District Service Workers' Union, Local 220 (Complainant) v. The Corporation of the County of Gray o/a Grey County Homes for the Aged (Respondent) (*Dismissed*)

2655-88-U: Michael Wayner (Complainant) v. Soft Drink Workers Union (Respondent) (*Withdrawn*)

2657-88-U: Roslie Grguric (Complainant) v. Communication & Electrical Workers of Canada, (C.W.C.), Local 544 (Respondent) (*Withdrawn*)

2684-88-U: Paul MacLellan (Complainant) v. Retail, Wholesale & Department Store Union (Respondent) (*Withdrawn*)

2685-88-U: Michael Ryan (Complainant) v. Ontario Hydro (Respondent) (*Withdrawn*)

2704-88-U: Radmilo Radoncic, and Francis Burgess (Complainants) v. IWA Canada, Local 2693, Claude Morissette, and Weldwood of Canada Ltd. (Respondents) (*Withdrawn*)

2739-88-U: David Allen Sharp (Complainant) v. Teamsters, Local Union 938 and Indusmin, division of Falconbridge Ltd. (Respondents) (*Withdrawn*)

2759-88-U, 2966-88-U: International Ladies Garment Workers Union (Complainant) v. Preston Manufacturing Ltd. (Respondent) (*Withdrawn*)

2837-88-U: Niagara Health Care & Service Workers Union, Local 302 affiliated with the Christian Labour Association of Canada (Complainant) v. Greycliff Manor (Respondent) (*Withdrawn*)

2844-88-U: Harry Blay (Complainant) v. United Garment Workers of America, Local 253 (Respondent) (*Withdrawn*)

2854-88-U: Bryan Edward Kennedy (Complainant) v. C.U.P.E., Local 1310 (Respondent) (*Withdrawn*)

2891-88-U: Canadian Paperworkers Union and its Local 333 (Complainant) v. Holt, Rinehart & Winston of Canada Ltd. (Respondent) (*Withdrawn*)

2920-88-U: Mr. Azim Babu Ramji (Complainant) v. Holiday Inn Hotel Toronto Downtown City Hall (Respondent) (*Withdrawn*)

2929-88-U: Labourers' International Union of North America, Local 493 (Complainant) v. Nickel Belt Aluminum of Sudbury Ltd. (Respondent) (*Withdrawn*)

2949-88-U: Ottawa Board of Education Employees Union (Complainant) v. Labourers' International Union of North America, Local 527 (Respondent) (*Withdrawn*)

2981-88-U: United Electrical, Radio & Machine Workers of Canada (UE) (Complainant) v. Westcan Electrical Manufacturing Inc. (Respondent) (*Withdrawn*)

2992-88-U: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. Place Minto Place Suite Hotel (Respondent) (*Withdrawn*)

3002-88-U, 3003-88-U: Ontario Nurses' Association (Complainant) v. Extendicare Health Services Inc. (Respondent) (*Withdrawn*)

3028-88-U: Lynn M. Bulmer (Applicant) v. International Brotherhood of Electrical Workers, Local 2345 (Respondent) v. Electrohome Ltd. (Intervener) (*Withdrawn*)

3033-88-U: Mr. Azim Babu Ramji (Complainant) v. Harbour Castle-Westin Hotel (Respondent) (*Withdrawn*)

3060-88-U: Canadian Union of Public Employees and its Local No. 65 (Complainant) v. The Board of Management for the Rainy River District Home for the Aged - Fort Frances (also known as 'Rainycrest Home for the Aged') (Respondent) (*Granted*)

3062-88-U, 3063-88-U: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. Place Minto Place Suite Hotel (Respondent) (*Withdrawn*)

3069-88-U: Shirley Cox (Complainant) v. T.P.S.T.H.C.P.T.E.I.U., Local 351 and Canadian Linen Supplies (Respondents) (*Withdrawn*)

3085-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Versa Foods Services (Motor Wheel) (Respondent) (*Withdrawn*)

3086-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Versa Foods Services (Motor Wheels Component) (Respondent) (*Withdrawn*)

3114-88-U: Carl R. Parsons (Complainant) v. Cesaroni Construction Ltd. (Respondent) (*Withdrawn*)

3118-88-U: Wickes Manufacturing Company Ltd. (Applicant) v. C.A.W. Canada, Local #195 (Respondent) (*Withdrawn*)

3135-88-U: Hotel, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Place Minto Place Suite Hotel (Respondent) (*Withdrawn*)

3138-88-U: Amalgamated Clothing & Textile Workers Union, Local 1685 (Complainant) v. Bovie Mfg. 564021 Ontario Inc. and Bob Bovie (Respondents) (*Withdrawn*)

3144-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Resform Construction Ltd. (Respondent) (*Withdrawn*)

3157-88-U: International Association of Machinists & Aerospace Workers (Complainant) v. Steelwaybuilding Systems & Sunhut, Division of Glen White Industries Ltd. (Respondent) (*Withdrawn*)

3180-88-U: Cynthia Drysdale (Complainant) v. Carl Whittiker (Respondent) (*Dismissed*)

3185-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Cedarvale Woodworking Ltd. (Respondent) (*Withdrawn*)

3187-88-U: International Association of Machinists & Aerospace Workers (Complainant) v. Cusco Fabricators Ltd. (Respondent) (*Granted*)

3189-88-U: Barry G. Koskinen and Lenard Bennett (Complainants) v. Eric Forde (Respondent) (*Dismissed*)

3212-88-U: Louis J. Contini (Complainant) v. Amalgamated Clothing & Textile Workers Union, Local 1305 (Respondent) v. Fiberglass Canada Inc. (Intervener) (*Withdrawn*)

3215-88-U: Anthony L.C. Haynes (Complainant) v. P. M. Toronto (Respondent) (*Dismissed*)

0012-89-U: Stanko Grancare (Complainant) v. The Carpenters, Local 27 (Respondent) (*Dismissed*)

0037-89-U: Zalina S. Narinesingh (Complainant) v. The Wellesley Hospital (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1929-88-M: Madella Toop (Applicant) v. Ontario Nurses Association (Respondent Trade Union) v. Carleton Place & District Memorial Hospital (Respondent Employer) (*Granted*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2398-87-M: Ontario Public Service Employees Union (Complainant) v. Durham College of Applied Arts & Technology (Respondent) (*Dismissed*)

3066-88-M: Letters Carriers' Union of Canada (Employer) v. Office & Professional Employees International Union, Local 225 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

2798-87-JD: Sudbury Algoma Hospital (Complainant) v. Ontario Nurses' Association and Ontario Public Service Employees Union (Respondents) (*Dismissed*)

1752-88-JD: State Contractors Inc. (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463; Sheet Metal Workers' and Roofers' Conference and Sheet Metal International Association, Local 30 (Respondents) v. Ontario Sheet Metal & Air Handling Group (Intervener) (*Withdrawn*)

2556-88-JD: Attic Mechanical & Maintenance Ltd. (Complainant) v. Millwrights' District Council of Ontario on its own behalf and on behalf of its Local 1916 (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Intervener) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1925-88-M: The Regional Municipality of Niagara (Applicant) v. Canadian Union of Public Employees, Local 1287 (Respondent) (*Withdrawn*)

2417-88-M: Family Service Association of Metropolitan Toronto (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

2812-88-M: Registered Nurses Association of Ontario (Applicant) v. Office & Professional Employees International Union, Local 343 (Respondent) (*Withdrawn*)

2813-88-M: Southern Ontario Newspaper Guild, Local 87 (Applicant) v. Metroland Printing, Publishing & Distributing, A Division of Harlequin Enterprises Ltd. (Respondent) (*Dismissed*)

3091-88-M: Canadian Union of Public Employees, Local 218 (Applicant) v. Durham Regional Roman Catholic Separate School Board (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0733-88-OH: Mr. Douglas Perigo (Complainant) v. A. H. Moore Agent for the Crown in Right of the Province of Ontario (Ministry of Community & Social Services) (Respondent) (*Dismissed*)

3056-88-OH: Nicholas Erdelez (Complainant) v. Canadian Protection Services (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

2398-87-M: Ontario Public Service Employees Union (Complainant) v. Durham College of Applied Arts & Technology (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

1315-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Westroyal Carpentry Ltd., and R.E.D.G. Construction Ltd. (Respondents) (*Withdrawn*)

3343-87-G: Ontario Sheet Metal Workers' & Roofers' Conference (Applicant) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Granted*)

3456-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Execway Construction Ltd. (Respondent) (*Withdrawn*)

3457-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bird Construction (Respondent) (*Withdrawn*)

1060-88-G: Quality Control Council of Canada (Applicant) v. Contract Inspection Services Co. Ltd. (Respondent) (*Granted*)

1491-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. State Contractors Inc. (Respondent) v. Ontario Sheet Metal Workers' & Roofers' Conference (Intervener #1) v. Sheet Metal Workers' International Association, Local 30 (Intervener #2) v. Ontario Sheet Metal & Air Handling Group (Intervener #3) (*Withdrawn*)

1609-88-G, 1610-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Green-spoon Brothers Ltd. (Respondent) (*Withdrawn*)

1938-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Provincial Cutting & Coring Ltd. (*Granted*)

2041-88-G: Marble, Tile & Terrazzo Union, Local 16 (Applicant) v. Wentworth Tile & Terrazzo Ltd. (Respondent) (*Withdrawn*)

2106-88-G: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1916 (Applicant) v. Attic Mechanical & Maintenance Ltd. (Respondent) (*Withdrawn*)

2244-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. T.W. Broome (Respondent) (*Granted*)

2424-88-G: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. R. M. Elliott Construction (Respondent) (*Withdrawn*)

2551-88-G: Teamsters Local No. 230 (Applicant) v. Ontario Paving Ltd. (Respondent) (*Withdrawn*)

2725-88-G, 2726-88-G, 2727-88-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Steinbergs Inc. (Respondent) (*Withdrawn*)

2753-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. F & R Charbonneau Construction Enr. (Respondent) (*Dismissed*)

2770-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 221 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Dismissed*)

2999-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crest Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

3012-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Murs Secs Laval (Canada) Ltee (Respondent) (*Withdrawn*)

3015-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Antuunes Carpentry Ontario Ltd. (Respondent) (*Granted*)

3036-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. 606889 Ont. Ltd. o/a Mike's Carpentry (Respondent) (*Withdrawn*)

3037-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pineridge Construction (1986) Ltd. (Respondent) (*Withdrawn*)

3038-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. 673914 Imperial Carpentry (Respondent) (*Withdrawn*)

3064-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. M & R Acoustics (Respondents) (*Withdrawn*)

3065-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Custom Forming Company (Respondent) (*Withdrawn*)

3072-88-G: Labourers' International Union of North America (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

3098-88-G: Labourers' International Union of North America, Local 607 (Applicant) v. 686807 Ontario Inc. o/a Cencan Group (Respondent) (*Withdrawn*)

3113-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. George & Asmussen Ltd. (Respondent) (*Withdrawn*)

3131-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Louis Le Blanc Excavating Ltd. (Respondent) (*Withdrawn*)

3197-88-G: International Union of Operating Engineers, Local 793 (Applicant) v. Farry Excavating & Grading Ltd. (Respondent) (*Granted*)

3204-88-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Withdrawn*)

3210-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Landford Developments Ltd. (Respondent) (*Withdrawn*)

0061-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E & M Carpentry (Respondent) (*Withdrawn*)

0062-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Amarcord Carpentry (Respondent) (*Withdrawn*)

0063-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. G.C.R. Construction Co. Ltd. (Respondent) (*Withdrawn*)

0066-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Square One Carpentry Inc. (Respondent) (*Withdrawn*)

0072-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 628 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Granted*)

0078-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. North Course Construction (Respondent) (*Withdrawn*)

0109-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. Trump Carpet & Ceramic Tile Inc. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3234-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Nickey Holdings Ltd. and Maddalene Holdings Ltd., c.o.b. as Artistic Railings (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Intervener) (*Dismissed*)

0445-87-U: Jean Liebman (Complainant) v. York University Staff Association and York University (Respondents) (*Dismissed*)

2610-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Tactix Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Withdrawn*)

0577-88-U: Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers and its Local 576 (Complainant) v. Hamilton Automatic Vending Company Ltd. (Respondent) (*Dismissed*)

APPLICATIONS FOR ACCREDITATION (CONSTRUCTION INDUSTRY)

0282-88-R: The Electrical Contractors' Association of Ottawa (Applicant) v. International Brotherhood of Electrical Workers, Local 586 (Respondent) (*Granted*)

Unit: "all employers of journeymen electricians and apprentices for whom the respondent has bargaining rights in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and the County of Lanark, in the residential sector of the construction industry, and for such other employers for whose employees respondent trade union may after the date hereof obtain bargaining rights through certification or voluntary recognition in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and the County of Lanark, in the residential sector of the construction industry"

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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ONTARIO LABOUR RELATIONS BOARD REPORTS

June 1989



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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Employer - Certification - Construction Industry - Whether respondent is an employer in the construction industry - Respondent replacing metal plates and pipes in recovery and steam plant at a pulp and paper mill during its annual shutdown - Work found to be maintenance work not repair - Application converted to one under the general provisions of the Act - All employee unit found appropriate - Certificate issuing	
LEVERT & ASSOCIATES CONTRACTING INC.; RE B.B.F	630
Employer - Collective Agreement - Construction Industry - Judicial Review - Board finding Windsor Board of Education to be an employer in the construction industry - Employer relying on "gentleman's agreement" as constituting a bar to the union's contracting out grievance - Board declaring "gentleman's agreement" null and void as it applies to the ICI sector - Union not estopped from enforcing the ICI agreement - Board finding that ICI agreement breached - Windsor Board of Education bringing application for judicial review on the grounds that, <i>inter alia</i> , the Board declined jurisdiction when it refused to apply the doctrine of promissory estoppel and the Board erred in determining that the Windsor Board of Education was acting as an "employer" in these circumstances - Judicial review dismissed by Divisional Court - Application by Windsor Board of Education for leave to appeal to the Court of Appeal dismissed	
WINDSOR, BOARD OF EDUCATION FOR THE CITY OF; RE U.A., LOCAL 552 AND ONTARIO LABOUR RELATIONS BOARD	707
Evidence - Bargaining Unit - Collective Agreement - Employee - Termination - Union arguing that bargaining unit included a large number of temporary agency workers - Collective agreement describing "all employee" unit - Agency workers not included on list at certification - Union never seeking to represent agency workers until termination application filed - Board determining that agency workers should not be treated as employees "in the unit" for purposes of the termination application - Relisted for hearing on issue of voluntariness of petition	
WESTBURNE INDUSTRIAL ENTERPRISES LTD., NEDCO, DIVISION OF; RE TISH VASSAIR; RE TEAMSTERS UNION, LOCAL 419	658
Evidence - Construction Industry - Judicial Review - Picketing - Unfair Labour Practice - Picketing by Labourers Union found to be in breach of the Act - Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union - Board granting declaratory relief to complainant Carpenters Union but not nullifying collective agreements - Carpenters Union bringing application for judicial review on the grounds that, <i>inter alia</i> , the Board refused to permit the applicant to lead evidence going to remedy - Judicial review dismissed by Divisional Court	
BAY-TOWER HOMES COMPANY LTD., BAY-TOWER MANAGEMENT INC., LEDI PROPERTIES INC., 518270 ONTARIO LIMITED, 554614 ONTARIO LIMITED; RE L.I.U.N.A., LOCAL 183, AND THE ONTARIO LABOUR RELATIONS BOARD; RE C.J.A., LOCAL 27	695
Evidence - Contempt - Stated Case - Witness - Principal of respondent refusing to produce employment forms without covering over personal information - Union stating case to Divisional Court - Refusal without lawful excuse - Conduct of principal constituting contempt notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on	

good behaviour - Application by principal for leave to appeal to the Court of Appeal dismissed

PLAZA FIBERGLAS MANUFACTURING LIMITED, PLAZA ELECTROPLATING LIMITED, CITCOR MANUFACTURING LTD., SABINA CITRON, CITRON AUTOMOTIVE DIVISION OF; RE U.S.W.A. AND THE ONTARIO LABOUR RELATIONS BOARD 707

Evidence - Employee Reference - Practice and Procedure - Whether persons holding the position of "nurse manager, shift/weekend" are employees - Board asked to reassess its practice of using the application date as the evidentiary cut-off - Date of actual commencement of the examination of the first witness selected where it is a newly-created position - Broader question of whether examination date should be the cut-off point for all s.106(2) applications not addressed - Persons in this classification not employees within the meaning of the Act

WHITBY GENERAL HOSPITAL; RE O.N.A. 664

Evidence - First Contract Arbitration - Practice and Procedure - Respondent objecting to the Board receiving a supplementary statement of material facts filed outside time limits in Practice Note - Board not granting leave to applicant to adduce evidence relating to the new allegations in its supplementary statement

PHILIPS AIR DISTRIBUTION LTD., LAU DIVISION -; RE C.A.W. 642

Evidence - Jurisdictional Dispute - Practice and Procedure - Complainant failing to comply with the Board's rules and practice note concerning filings - Respondents objecting to the introduction of two documents and any evidence of area practice - Board not allowing evidence in - Complaint involving the transportation of heavy equipment on float trucks - Criteria and delay of 10 years favouring status quo - Complaint dismissed

SPRUCE FALLS POWER AND PAPER COMPANY LIMITED, C.P.U., LOCAL 89, AND; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 645

Evidence - Membership Evidence - Steelworkers Union seeking reconsideration of Board decision consenting to the early termination of a collective agreement on the grounds that, *inter alia*, the employees did not have notice of the request - Union seeking to introduce membership cards to corroborate direct evidence relating to its organizing campaign - Cards of limited probative value - Board exercising its discretion to refuse to admit the cards in evidence

GOLDCREST FURNITURE LTD.; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS, LOCAL 847, AFFILIATED WITH THE TEAMSTERS UNION; RE GERARDO MERCANTE, VINCENZO REDA, FRANCO BINI AND U.S.W.A. 604

First Contract Arbitration - Evidence - Practice and Procedure - Respondent objecting to the Board receiving a supplementary statement of material facts filed outside time limits in Practice Note - Board not granting leave to applicant to adduce evidence relating to the new allegations in its supplementary statement

PHILIPS AIR DISTRIBUTION LTD., LAU DIVISION -; RE C.A.W. 642

Health and Safety - Charter of Rights and Freedoms - Judicial Review - Youth services officer at secured custody facility refusing to work at another location at the facility because of his belief that he would be putting his co-workers in danger - Officer completing shift at his regular location and receiving reprimand letters - OHSA providing that such persons do not have the right to refuse work which would endanger co-workers' safety - Board dismissing complaint - Worker cannot refuse work on the basis that some other provision in the Act creates a right to disobey the employer - Officer's actions constituting insubordination - Board not exercising discretion to substitute a different penalty - Officer bringing applica-

tion for judicial review on the grounds that, *inter alia*, the Board erred in law and exceeded its jurisdiction in its interpretation of the OHSA and that the provision in the OHSA by which he was excluded from the right to refuse unsafe work was contrary to s.15, the equality provision, of the Canadian Charter of Rights and Freedoms - Judicial review dismissed by Divisional Court - Application by officer for leave to appeal to the Court of Appeal dismissed

MINISTRY OF COMMUNITY AND SOCIAL SERVICES, THE CROWN IN RIGHT OF ONTARIO AND ONTARIO LABOUR RELATIONS BOARD; RE DOUGLAS LLOYD

698

Interference in Trade Unions - Unfair Labour Practice - Union spokesman banned from employer's premises following altercation with management - Employer willing to deal with any other union representative or this representative but off its premises - Employer not engaged in a scheme to undermine the union's bargaining position - Problems best resolved through discussion and not Board intervention

VICTORY SOYA MILLS; RE TEAMSTERS UNION, LOCAL 1247 CHEMICAL, ENERGY AND ALLIED WORKERS

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Judicial Review - Certification - Constitutional Law - Board determining that there is a category of employees of Ontario Hydro who are employed on or in connection with works which by section 17 of the *Atomic Energy Control Act* have been declared to be works for the general advantage of Canada - Ontario Hydro bringing application for judicial review for a declaration that the *Labour Relations Act* applies to its nuclear workers - Divisional Court quashing Board decision and declaring that the provincial Act applies to the nuclear employees of Ontario Hydro

ONTARIO HYDRO; RE ONTARIO LABOUR RELATIONS BOARD, THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES, C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000, THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES, TOM STEVENS, C.S. STEVENSON, MICHELLE MORRISSEY-O'RYAN, GEORGE ORR

698

Judicial Review - Certification Where Act Contravened - Charter of Rights and Freedoms - Unfair Labour Practice - Board determining that lay off of workers constituting unfair labour practice - Union certified pursuant to s.8 - Reverse onus not contrary to Charter - Employer and employees bringing applications for judicial review on the grounds that, *inter alia*, the Board misled the employees as to the evidence to be adduced and failed to find the reverse onus provision to be contrary to the Charter - Judicial reviews dismissed by Divisional Court

KNOB HILL FARMS LIMITED, THE ONTARIO LABOUR RELATIONS BOARD AND U.F.C.W., LOCAL 206 AND; RE DONNA BAYDAK ON BEHALF OF A GROUP OF 156 EMPLOYEES

697

Judicial Review - Charter of Rights and Freedoms - Health and Safety - Youth services officer at secured custody facility refusing to work at another location at the facility because of his belief that he would be putting his co-workers in danger - Officer completing shift at his regular location and receiving reprimand letters - OHSA providing that such persons do not have the right to refuse work which would endanger co-workers' safety - Board dismissing complaint - Worker cannot refuse work on the basis that some other provision in the Act creates a right to disobey the employer - Officer's actions constituting insubordination - Board not exercising discretion to substitute a different penalty - Officer bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law and exceeded its jurisdiction in its interpretation of the OHSA and that the provision in the OHSA by which he was excluded from the right to refuse unsafe work was contrary to s.15, the equal-

ity provision, of the Canadian Charter of Rights and Freedoms - Judicial review dismissed by Divisional Court - Application by officer for leave to appeal to the Court of Appeal dismissed

MINISTRY OF COMMUNITY AND SOCIAL SERVICES, THE CROWN IN RIGHT OF ONTARIO AND ONTARIO LABOUR RELATIONS BOARD; RE DOUGLAS LLOYD

698

Judicial Review - Collective Agreement - Construction Industry - Employer - Board finding Windsor Board of Education to be an employer in the construction industry - Employer relying on "gentleman's agreement" as constituting a bar to the union's contracting out grievance - Board declaring "gentleman's agreement" null and void as it applies to the ICI sector - Union not estopped from enforcing the ICI agreement - Board finding that ICI agreement breached - Windsor Board of Education bringing application for judicial review on the grounds that, *inter alia*, the Board declined jurisdiction when it refused to apply the doctrine of promissory estoppel and the Board erred in determining that the Windsor Board of Education was acting as an "employer" in these circumstances - Judicial review dismissed by Divisional Court - Application by Windsor Board of Education for leave to appeal to the Court of Appeal dismissed

WINDSOR, BOARD OF EDUCATION FOR THE CITY OF; RE U.A., LOCAL 552 AND ONTARIO LABOUR RELATIONS BOARD

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Judicial Review - Construction Industry - Evidence - Picketing - Unfair Labour Practice - Picketing by Labourers Union found to be in breach of the Act - Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union - Board granting declaratory relief to complainant Carpenters Union but not nullifying collective agreements - Carpenters Union bringing application for judicial review on the grounds that, *inter alia*, the Board refused to permit the applicant to lead evidence going to remedy - Judicial review dismissed by Divisional Court

BAY-TOWER HOMES COMPANY LTD., BAY-TOWER MANAGEMENT INC., LEDI PROPERTIES INC., 518270 ONTARIO LIMITED, 554614 ONTARIO LIMITED; RE L.I.U.N.A., LOCAL 183, AND THE ONTARIO LABOUR RELATIONS BOARD; RE C.J.A., LOCAL 27

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Judicial Review - Construction Industry - Parties - Practice and Procedure - Reconsideration - Termination - Termination application naming as respondents District Council and one local - International, District Council and all affiliated union locals necessary parties - Application dismissed at hearing - Board reconsidering its decision to dismiss and permitting applicants to amend the title of the application - Labourers Union bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law by failing to notify the Union that it intended to reconsider its decision and by failing to afford the Union an opportunity to make submissions - Judicial review dismissed by Divisional Court

DOUBLE S CONSTRUCTION, MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI, ONTARIO LABOUR RELATIONS BOARD, 657572 ONTARIO INC., C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, AND ITS AFFILIATED LOCAL UNIONS L.I.U.N.A., LOCALS 183 ET AL

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Jurisdictional Dispute - Evidence - Practice and Procedure - Complainant failing to comply with the Board's rules and practice note concerning filings - Respondents objecting to the introduction of two documents and any evidence of area practice - Board not allowing evidence in - Complaint involving the transportation of heavy equipment on float trucks - Criteria and delay of 10 years favouring status quo - Complaint dismissed

SPRUCE FALLS POWER AND PAPER COMPANY LIMITED, C.P.U., LOCAL 89, AND; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995

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Judicial Review - Related Employer - Unfair Labour Practice - Construction companies declared to be one employer - Adjournment of hearing to determine quantum of damages on the ground of insufficient notice to one corporation denied - Corporation bringing application for judicial review on the grounds that, *inter alia*, the Board erred in finding that related business activities were carried on and in denying the adjournment - Judicial review dismissed by Divisional Court

G.P. CONSTRUCTION, 556631 ONTARIO LIMITED, C.O.B. AS; RE I.B.E.W., LOCAL 1687, AND THE ONTARIO LABOUR RELATIONS BOARD

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Jurisdictional Dispute - Jurisdictional dispute complaint filed by contractor in defence of a grievance filed by the Labourers Union - Complainant contracting for the supply and installation of drywall - Complaint relating to the off-loading, conveying and stock-piling of drywall - Work done by the supplier of building materials - Delivery included in price of materials - Union made no demand on the supplier as "employer" under s. 91 - Board without jurisdiction to hear complaint

FOUR SEASONS DRYWALL SYSTEMS AND ACOUSTICS LIMITED; RE L.I.U.N.A., LOCAL 506 AND DRYWALL, ACOUSTIC, LATHING AND INSULATION, LOCAL 675 OF THE C.J.A.

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Membership Evidence - Certification - Board inquiring into the reliability of the Form 9 - Place of Form 9 in certification proceedings reviewed - Board satisfied with the reliability of the Form 9 - Ballots counted - Application dismissed

CUDDY FOOD PRODUCTS, CUDDY FOOD PRODUCTS LTD. AND CUDDY INTERNATIONAL CORPORATION C.O.B. AS A PARTNERSHIP IN THE NAME OF; RE R.W.D.S.U., AFL:CIO:CLC.; RE U.F.C.W., LOCAL 175, AFL-CIO-CLC.....

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Membership Evidence - Evidence - Steelworkers Union seeking reconsideration of Board decision consenting to the early termination of a collective agreement on the grounds that, *inter alia*, the employees did not have notice of the request - Union seeking to introduce membership cards to corroborate direct evidence relating to its organizing campaign - Cards of limited probative value - Board exercising its discretion to refuse to admit the cards in evidence

GOLDCREST FURNITURE LTD.; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS, LOCAL 847, AFFILIATED WITH THE TEAMSTERS UNION; RE GERARDO MERCANTE, VINCENZO REDA, FRANCO BINI AND U.S.W.A.

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Parties - Construction Industry - Judicial Review - Practice and Procedure - Reconsideration - Termination - Termination application naming as respondents District Council and one local - International, District Council and all affiliated union locals necessary parties - Application dismissed at hearing - Board reconsidering its decision to dismiss and permitting applicants to amend the title of the application - Labourers Union bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law by failing to notify the Union that it intended to reconsider its decision and by failing to afford the Union an opportunity to make submissions - Judicial review dismissed by Divisional Court

DOUBLE S CONSTRUCTION, MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI, ONTARIO LABOUR RELATIONS BOARD, 657572 ONTARIO INC., C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, AND ITS AFFILIATED LOCAL UNIONS L.I.U.N.A., LOCALS 183 ET AL.....

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Picketing - Construction Industry - Evidence - Judicial Review - Unfair Labour Practice - Picketing by Labourers Union found to be in breach of the Act - Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union - Board granting declara-

tory relief to complainant Carpenters Union but not nullifying collective agreements - Carpenters Union bringing application for judicial review on the grounds that, *inter alia*, the Board refused to permit the applicant to lead evidence going to remedy - Judicial review dismissed by Divisional Court

BAY-TOWER HOMES COMPANY LTD., BAY-TOWER MANAGEMENT INC., LEDI PROPERTIES INC., 518270 ONTARIO LIMITED, 554614 ONTARIO LIMITED; RE L.I.U.N.A., LOCAL 183, AND THE ONTARIO LABOUR RELATIONS BOARD; RE C.J.A., LOCAL 27.....

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Picketing - Strike - Employees picketing during unpaid lunch breaks - Union not in a legal strike position - Picketing not designed to have any impact on the applicant's business - Picketing not in connection with nor constituting an unlawful strike - Application dismissed

ART GALLERY OF ONTARIO, THE; RE O.P.S.E.U., O.P.S.E.U., LOCAL 535, TED LOUGHEAD, ED GORLEY, RUTH JONES, CARLA ROTH, KAREN HEFFERNAN, SHARON MCGILL, ELIZABETH KHERA, MICHAEL DOUGLAS, MARY GRETA, KERRY KIM, CATHERINE SPENCE, JILL CATE, GISELA NAVIA, BUD JOHNSTON, CLAIRA HARGITAY

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Practice and Procedure - Certification - Employees on Schedule C of employee lists not at work within the 30 day period prior to the application date - Earlier application where these employees would have been included in the unit withdrawn - Employer arguing that the 30-30 rule should not be applied because the union was gerrymandering by picking an application date more than 30 days after the lay offs - No reason to decline to apply the 30-30 rule - Employees on Schedule C excluded from the lists

FLO-CON CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES

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Practice and Procedure - Certification - Pre-Hearing Vote - Pre-hearing vote conducted and ballot box sealed - Applicant seeking leave to withdraw prior to ballots being counted - Whether a bar should be imposed on further applications by the applicant - Board making distinction between a dismissal that results from the union losing the vote and a dismissal that results from the union not having sufficient membership evidence entitling it to a vote - No bar imposed

AMARCORD CARPENTERS LTD.; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27 (FORMERLY LOCAL 1190)

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Practice and Procedure - Construction Industry - Judicial Review - Parties - Reconsideration - Termination - Termination application naming as respondents District Council and one local - International, District Council and all affiliated union locals necessary parties - Application dismissed at hearing - Board reconsidering its decision to dismiss and permitting applicants to amend the title of the application - Labourers Union bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law by failing to notify the Union that it intended to reconsider its decision and by failing to afford the Union an opportunity to make submissions - Judicial review dismissed by Divisional Court

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Practice and Procedure - Counsel for the respondent asking the Board to rule on two "preliminary" matters - Board not obliged to deal in a "preliminary" manner with any issue -

Respondent's arguments can be raised before the panel that hears the merits of the applications	
INNOPAC INC. PURITY PACKAGING, PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA.....	608
Practice and Procedure - Employee Reference - Evidence - Whether persons holding the position of "nurse manager, shift/weekend" are employees - Board asked to reassess its practice of using the application date as the evidentiary cut-off - Date of actual commencement of the examination of the first witness selected where it is a newly-created position - Broader question of whether examination date should be the cut-off point for all s.106(2) applications not addressed - Persons in this classification not employees within the meaning of the Act	
WHITBY GENERAL HOSPITAL; RE O.N.A.	664
Practice and Procedure - Evidence - First Contract Arbitration - Respondent objecting to the Board receiving a supplementary statement of material facts filed outside time limits in Practice Note - Board not granting leave to applicant to adduce evidence relating to the new allegations in its supplementary statement	
PHILIPS AIR DISTRIBUTION LTD., LAU DIVISION -; RE C.A.W.	642
Practice and Procedure - Evidence - Jurisdictional Dispute - Complainant failing to comply with the Board's rules and practice note concerning filings - Respondents objecting to the introduction of two documents and any evidence of area practice - Board not allowing evidence in - Complaint involving the transportation of heavy equipment on float trucks - Criteria and delay of 10 years favouring status quo - Complaint dismissed	
SPRUCE FALLS POWER AND PAPER COMPANY LIMITED, C.P.U., LOCAL 89, AND; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995.....	645
Pre-Hearing Vote - Certification - Practice and Procedure - Pre-hearing vote conducted and ballot box sealed - Applicant seeking leave to withdraw prior to ballots being counted - Whether a bar should be imposed on further applications by the applicant - Board making distinction between a dismissal that results from the union losing the vote and a dismissal that results from the union not having sufficient membership evidence entitling it to a vote - No bar imposed	
AMARCORD CARPENTERS LTD.; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27 (FORMERLY LOCAL 1190)	531
Pre-Hearing Vote - Certification - School Boards and Teachers Collective Negotiations Act - <i>Ottawa-Carleton French-Language School Board Act, 1988</i> setting up a distinct school board for French-language education in the Ottawa area - Applicant applying to be certified for occasional teachers and part-time supply instructors employed by the respondent - Respondent arguing that it is not the employer - Board examining scheme of Act - Pre-hearing vote ordered - Outstanding issues to be addressed at hearing following vote	
CONSEIL SCOLAIRE DE LANGUE FRANÇAISE D'OTTAWA-CARLETON (SECTION CATHOLIQUE); RE ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS SUPPLÉANTS D'OTTAWA-CARLETON ÉLÉMENTAIRE SÉPARÉE.....	575
Reconsideration - Construction Industry - Judicial Review - Parties - Practice and Procedure - Termination - Termination application naming as respondents District Council and one local - International, District Council and all affiliated union locals necessary parties - Application dismissed at hearing - Board reconsidering its decision to dismiss and permitting applicants to amend the title of the application - Labourers Union bringing application for judicial review on the grounds that, <i>inter alia</i> , the Board erred in law by failing to notify	

the Union that it intended to reconsider its decision and by failing to afford the Union an opportunity to make submissions - Judicial review dismissed by Divisional Court

DOUBLE S CONSTRUCTION, MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI, ONTARIO LABOUR RELATIONS BOARD, 657572 ONTARIO INC., C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, AND ITS AFFILIATED LOCAL UNIONS L.I.U.N.A., LOCALS 183 ET AL.....

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Related Employer - Judicial Review - Unfair Labour Practice - Construction companies declared to be one employer - Adjournment of hearing to determine quantum of damages on the ground of insufficient notice to one corporation denied - Corporation bringing application for judicial review on the grounds that, *inter alia*, the Board erred in finding that related business activities were carried on and in denying the adjournment - Judicial review dismissed by Divisional Court

G.P. CONSTRUCTION, 556631 ONTARIO LIMITED, C.O.B. AS; RE I.B.E.W., LOCAL 1687, AND THE ONTARIO LABOUR RELATIONS BOARD

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School Boards and Teachers Collective Negotiations Act - Certification - Pre-Hearing Vote - *Ottawa-Carleton French-Language School Board Act, 1988* setting up a distinct school board for French-language education in the Ottawa area - Applicant applying to be certified for occasional teachers and part-time supply instructors employed by the respondent - Respondent arguing that it is not the employer - Board examining scheme of Act - Pre-hearing vote ordered - Outstanding issues to be addressed at hearing following vote

CONSEIL SCOLAIRE DE LANGUE FRANÇAISE D'OTTAWA-CARLETON (SECTION CATHOLIQUE); RE ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS SUPPLÉANTS D'OTTAWA-CARLETON ÉLÉMENTAIRE SÉPARÉE.....

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Stated Case - Contempt - Evidence - Witness - Principal of respondent refusing to produce employment forms without covering over personal information - Union stating case to Divisional Court - Refusal without lawful excuse - Conduct of principal constituting contempt notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on good behaviour - Application by principal for leave to appeal to the Court of Appeal dismissed

PLAZA FIBERGLAS MANUFACTURING LIMITED, PLAZA ELECTROPLATING LIMITED, CITCOR MANUFACTURING LTD., SABINA CITRON, CITRON AUTOMOTIVE DIVISION OF; RE U.S.W.A. AND THE ONTARIO LABOUR RELATIONS BOARD

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Strike - Picketing - Employees picketing during unpaid lunch breaks - Union not in a legal strike position - Picketing not designed to have any impact on the applicant's business - Picketing not in connection with nor constituting an unlawful strike - Application dismissed

ART GALLERY OF ONTARIO, THE; RE O.P.S.E.U., O.P.S.E.U., LOCAL 535, TED LOUGHEAD, ED GORLEY, RUTH JONES, CARLA ROTH, KAREN HEFFERNAN, SHARON MCGILL, ELIZABETH KHERA, MICHAEL DOUGLAS, MARY GRETA, KERRY KIM, CATHERINE SPENCE, JILL CATE, GISELA NAVIA, BUD JOHNSTON, CLAIRA HARGITAY

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Strike - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly char-

- acterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common
- EMPRESS GRAPHICS INC., COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF; RE G.C.I.U., LOCAL 500M, LITHOGRAPHERS, MIKE R. ZAJAC, EARL MCDONNELL AND CLIFF ROBINSON 587
- Termination - Bargaining Unit - Collective Agreement - Employee - Evidence - Union arguing that bargaining unit included a large number of temporary agency workers - Collective agreement describing "all employee" unit - Agency workers not included on list at certification - Union never seeking to represent agency workers until termination application filed - Board determining that agency workers should not be treated as employees "in the unit" for purposes of the termination application - Relisted for hearing on issue of voluntariness of petition
- WESTBURNE INDUSTRIAL ENTERPRISES LTD., NEDCO, DIVISION OF; RE TISH VASSAIR; RE TEAMSTERS UNION, LOCAL 419 658
- Termination - Construction Industry - Judicial Review - Parties - Practice and Procedure - Reconsideration - Termination application naming as respondents District Council and one local - International, District Council and all affiliated union locals necessary parties - Application dismissed at hearing - Board reconsidering its decision to dismiss and permitting applicants to amend the title of the application - Labourers Union bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law by failing to notify the Union that it intended to reconsider its decision and by failing to afford the Union an opportunity to make submissions - Judicial review dismissed by Divisional Court
- DOUBLE S CONSTRUCTION, MICHAEL VAN LANDEGHEM, TRACY VAN LANDEGHEM AND TERRY MANZUTTI, ONTARIO LABOUR RELATIONS BOARD, 657572 ONTARIO INC., C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, AND ITS AFFILIATED LOCAL UNIONS L.I.U.N.A., LOCALS 183 ET AL 696
- Unfair Labour Practice - Certification Where Act Contravened - Charter of Rights and Freedoms - Judicial Review - Board determining that lay off of workers constituting unfair labour practice - Union certified pursuant to s.8 - Reverse onus not contrary to Charter - Employer and employees bringing applications for judicial review on the grounds that, *inter alia*, the Board misled the employees as to the evidence to be adduced and failed to find the reverse onus provision to be contrary to the Charter - Judicial reviews dismissed by Divisional Court
- KNOB HILL FARMS LIMITED, THE ONTARIO LABOUR RELATIONS BOARD AND U.F.C.W., LOCAL 206 AND; RE DONNA BAYDAK ON BEHALF OF A GROUP OF 156 EMPLOYEES 697
- Unfair Labour Practice - Construction Industry - Evidence - Judicial Review - Picketing - Picketing by Labourers Union found to be in breach of the Act - Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union - Board granting declaratory relief to complainant Carpenters Union but not nullifying collective agreements - Carpenters Union bringing application for judicial review on the grounds that, *inter alia*, the Board refused to permit the applicant to lead evidence going to remedy - Judicial review dismissed by Divisional Court
- BAY-TOWER HOMES COMPANY LTD., BAY-TOWER MANAGEMENT INC., LEDI PROPERTIES INC., 518270 ONTARIO LIMITED, 554614 ONTARIO LIMITED; RE L.I.U.N.A., LOCAL 183, AND THE ONTARIO LABOUR RELATIONS BOARD; RE C.J.A., LOCAL 27 695
- Unfair Labour Practice - Dependent Contractor - Discharge for Union Activity - Employee -

Union alleging that grievor was discharged in contravention of Act - Employer arguing that grievor was not an employee but an independent contractor - Employer in business of hauling raw forest products from logging sites to mills - Grievor was a hauling contractor - Whether grievor a dependent contractor and therefore an employee or an independent contractor - Grievor found to be an independent contractor - Complaint dismissed	
ATWAY TRANSPORT INC.; RE I.W.A.	540
Unfair Labour Practice - Duty to Bargain in Good Faith - Respondent failing to disclose its intention to shut down one of its steam turbine generators operated by bargaining unit employees - Four positions eliminated and 21 employees realigned - <i>De facto</i> decision to shut down generator made prior to or in course of collective bargaining between parties - Breach of bargaining duty - Question of remedy remitted to parties	
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0302-87-R Labourers' International Union of North America, Local 183, Applicant v. **Amarcord Carpenters Ltd.**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27 (formerly Local 1190), Intervener

Certification - Practice and Procedure - Pre-Hearing Vote - Pre-hearing vote conducted and ballot box sealed - Applicant seeking leave to withdraw prior to ballots being counted - Whether a bar should be imposed on further applications by the applicant - Board making distinction between a dismissal that results from the union losing the vote and a dismissal that results from the union not having sufficient membership evidence entitling it to a vote - No bar imposed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

DECISION OF THE BOARD; June 6, 1989

1. This is an application for certification in which the applicant requested that a pre-hearing representation vote be conducted. There was a disagreement about the number of persons employed in the appropriate bargaining unit on the application date. The applicant said there were 7; the respondent said there were 11 and intervener said there were 12 or more. The applicant had filed membership evidence with respect to 4 employees, which is more than 35 per cent of 7 or 11, but less than 35 per cent of 12. In accordance with the approach described in *Board of Education for the City of North York*, [1984] OLRB Rep. July 989 and *Scarborough Board of Education*, [1985] OLRB Rep. July 1164, the panel which then dealt with the issues described in subsection 9(2) of the Act directed that a pre-hearing representation vote be conducted and that the ballot box be sealed and the ballots not counted pending the post-vote resolution of the issues in dispute. After the vote was taken and after some of the persons in dispute had been examined by a labour relations officer appointed for that purpose, the applicant sought leave to withdraw this application.

2. Having regard to the stage these proceedings had reached by the time the applicant made its request, leave to withdraw is refused and this application is hereby dismissed. The issue with which the balance of this decision deals is whether we will also impose a temporary bar on further applications by the applicant, pursuant to clause 103(2)(i) of the *Labour Relations Act* ("the Act"), as the intervener submits we should.

3. The applicant's request for leave to withdraw was made in a letter from its counsel to the Registrar. That letter concluded with this explanation:

On the basis of all the information with which the Applicant has now been provided, it is clear that in the circumstances of this case the applicant did not have enough cards to even warrant a vote. The Applicant therefore requests the Board's permission to withdraw this application.

We take it that its reference to not having "enough cards to even warrant a vote" meant the applicant had concluded that the pre-hearing representation vote which had already been taken would not ultimately be given "the same effect as a representation vote taken under subsection 7(2)" under subsection 9(4) of the Act, because it would not be able to satisfy the Board that not less than thirty-five per cent of the employees in the bargaining unit were members of the trade union at the time the application was made.

4. The respondent and intervener were informed of the applicant's request and given an opportunity to make submissions in response. Only the intervener did. It submitted that it had

always taken the position, and had repeatedly advised the applicant, that the applicant was “not in a vote position”, which we take to have the same meaning as the applicant’s reference to not having “enough cards to warrant a vote”. After reciting the history of these proceedings, counsel for the intervener submitted that:

Having regard to the foregoing facts, it is clear that the Carpenters, the Respondent and the Board have been put to a colossal waste of time, effort and money. It is respectfully submitted that it ought to have been obvious to the Labourers from the outset that it was not in a vote position. Having insisted that the wishes of the employees be tested by a vote, and having put the other parties to the expense of Labour Relations Office proceedings, the Labourers now seek to painlessly extricate itself from the proceedings and to perhaps institute a fresh application for certification.

Under these circumstances, it is our respectful submission that the Board should not grant the Labourers permission to withdraw its Application. Rather, it is submitted that the Board ought to dismiss the Application and further that the Board ought to bar the Labourers for six (6) months, pursuant to Section 103(2)(i) of the *Labour Relations Act*. Alternatively, it is respectfully submitted that the Board ought to dismiss the Labourers’ Application with a caution to the Labourers that in the event that it brings a new Application within six (6) months, it will bear the onus of establishing that special circumstances exist to warrant the new Application being heard.

In reply, counsel for the applicant made these submissions:

It is the position of Labourers, Local 183, that the bar ought not to be imposed. However, this issue may or may not be moot as it is at present only speculation as to whether or not the Labourers will make a fresh application for certification. Therefore, we respectfully submit that the Carpenter’s request that a new application be barred should only be dealt with if and when a fresh application is brought and not now.

In the alternative, if the Board is not in agreement with deferring argument on this issue if and when a new application is brought, we respectfully ask that the Board schedule a hearing for the purpose of determining whether or not the Carpenter’s request for the imposition of a bar should be granted at this time. Granting the Carpenter’s request would require the Board to make a determination regarding the Labourers’ motivation in its conduct of the present application and it is our submission that this matter cannot properly be dealt with by way of written submissions.

5. Under clause 103(2)(i) of the Act, the Board has the power

to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

The Board’s approach to the exercise of its powers under this clause was described in general terms in *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 91, at paragraph 7:

As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.*, 1976) OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC ¶18,026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2)(i) in other situations. The leading example of this

is the *J.W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where “in light of the special and extreme circumstances confronting the Board”, namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2)(i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or improper conduct. (See *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6.).

The rationale for imposing a bar was explained this way in *General Freezer Limited*, 63 CLLC ¶16,294:

A bar to future applications for certification is usually imposed following a dismissal after a representation vote is taken, due to the fact that in such cases, all of the employees in the bargaining unit have had the opportunity to express their wishes with respect to their choice of a bargaining agent by means of a secret ballot, and therefore the true wishes of the employees have been fully tested. It is not the Board's usual practice to impose a bar to future applications for certification where an applicant fails to submit sufficient evidence of membership to entitle it to a representation vote where there is no incumbent bargaining agent. The success of an applicant union's organization campaign is dependent on many factors and its failure to acquire sufficient membership has not the same evidentiary value with respect to the wishes of the employees as a representation vote.

6. From its references in these and other decisions to employees' desires having been tested by a representation vote or to employees' having had an opportunity to express their wishes in a representation vote, it appears that the Board had in mind a representation vote whose outcome was or would have been determinative of the outcome of the certification application. This impression is reinforced by the language used in the opening sentence of an often quoted passage from *Mathias Ouellette*, 56 CLLC ¶18,026:

Where, after the taking of a representation vote directed by the Board, an application is dismissed because not more than 50 per centum of the ballots of all those eligible to vote were cast in favour of the applicant, the Board usually [imposes a bar].

The same impression is created by the approach taken by the Board in *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441. There, a prior application had been dismissed when the Board found there had been no money payment in respect of one of the membership documents submitted. When the unsuccessful applicant filed a fresh application a month later, a rival trade union argued that it should not be entertained. In that context, the Board made these observations:

5. If the Board's jurisdiction were extended so that the Board had punitive powers, there would be merit in the argument made by the intervener. However, the Board's jurisdiction under the Labour Relations Act in an application for certification is confined to ascertaining the true wishes of employees with respect to the trade union's right to represent them in an appropriate bargaining unit. Where the true wishes of employees have been established with the certainty permitted by a representation vote, the Board, under the authority of section 77(2)(1), imposes a bar of six months on future applications by that union. The Board imposes a bar with the view to promoting a sound employer-employee relationship by avoiding the confusion and turmoil of repetitive applications by a union which has been given full and complete opportunity to establish its right to represent the employees through a representation vote. In the exercise of its discretion under section 77(2)(1), the Board endeavours to provide a cooling off period during which the employees may assess their position with respect to their desire to be represented by the applicant union by temporarily postponing repetitive applications for certification by that union.

6. In the case where non-pay has been established and the Board is placed in the position where

it can place no reliance on the union's evidence of membership, the Board is unable to find that the union enjoys the support of at least forty-five per cent of the employees and therefore has no jurisdiction to direct a representation vote. In making the finding that it is unable to place reliance on the evidence of membership submitted, such finding is concerned only with respect to the evidentiary value of the membership documents. It is not a finding made following a test of the actual support that the union enjoys among all the company's employees.

7. While a union, which has been found guilty of non-pay, has by its own activities destroyed the evidentiary value of its membership evidence, either in whole if a union official is involved, or in part if a rank and file employees has perpetrated the fraud, it cannot be said that the Board in making such finding has ascertained the true wishes of the employees. On the contrary, the Board is unable to ascertain the wishes of the employees since the evidence of their wishes has been cast in doubt. Where the true wishes of employees have not been ascertained, it is not the Board's practice to impose a bar on future applications by the unsuccessful union.

The Board went on to hold that it would not be a proper exercise of its powers either to bar or refuse to entertain subsequent applications when it was the applicant's irregular conduct which led to dismissal of the initial application.

7. The passages we have quoted from *General Freezer Limited*, *Mathias Ouellette* and *Watson Manufacturing* make a distinction between a dismissal which results from employees' rejection of the applicant at the polls and dismissal which results from an applicant's failure to satisfy the Board that its documentary evidence of membership is of sufficient quantity and quality to entitle the applicant either to outright certification or to have its right to certification determined by the outcome of a representation vote. In our view, the same distinction should be made when dealing with a request for withdrawal made at a stage when it is said that the applicant must be anticipating defeat, so that a bar or refusal to entertain a new application would follow if the anticipated defeat was one which would have been caused by the results of a representation vote, but not if the anticipated defeat was one which would have resulted from a failure to satisfy the Board that its documentary evidence of membership was qualitatively and quantitatively sufficient even to permit the outcome to be determined by the results of a representation vote.

8. When an application is made under Section 7 of the Act, a representation vote cannot be directed unless the Board is satisfied that the applicant had the requisite membership support among employees in the appropriate bargaining unit at the relevant time. Once a certification application reaches the stage at which a representation vote has been directed under subsection 7(2), the results of that vote will ordinarily determine the outcome of the application. If such a vote has been conducted but not yet counted when an applicant requests leave to withdraw the application then, in the absence of any allegations of impropriety in connection with the conduct of the vote, one might fairly infer that the request was made because the trade union anticipated defeat at the hands of the employees whom it was seeking to represent. The analysis is not so simple, however, when a trade union requests leave to withdraw an application after a pre-hearing representation vote has been conducted.

9. Under section 9 of the Act, the Board does not determine the appropriate bargaining unit or satisfy itself with respect to the requisite level of membership support among employees in that unit before directing that a pre-hearing representation vote be taken. Under subsection 9(2), a pre-hearing representation vote can be taken if an applicant merely "appears" to have the requisite support in a voting constituency which may not ultimately be found to be co-extensive with the appropriate bargaining unit. The merits of the application are only dealt with after the vote, at the hearing contemplated by subsection 9(4) of the Act, which reads:

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not

less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

The corollary of subsection 9(4) is that a pre-hearing representation vote does not have the same effect as a representation vote taken under subsection 7(2) if the trade union does not establish the requisite level of employee support in the hearings which follow the taking of the vote. There is a substantial difference between having the appearance of support required by subsection 9(2) and satisfying the more stringent test imposed by subsection 9(4). It is entirely possible for a certification application to be dismissed *despite* the applicant's having had a majority of ballots cast its favour in a pre-hearing representation vote, as occurred in *W. & H. Voortman Limited*, [1975] OLRB Rep. Aug. 605 (where the application failed because the applicant's membership evidence was found to be unsatisfactory). That is one of the reasons why, when there is any serious question whether the applicant's membership evidence will establish the level of support required by subsection 9(4), the ballots cast in a pre-hearing representation vote are not ordinarily counted until the Board has determined that question.

10. In this case, there was a serious dispute about the number of persons employed in the appropriate bargaining unit on the application date. That put in question the ability of the applicant to satisfy the membership evidence requirements of subsection 9(4) of the Act. While there was an appearance of support sufficient to warrant conducting a pre-hearing representation vote, there was from the outset a question whether that vote could ultimately be given the same effect as a representation vote taken under subsection 7(2). The intervener's position was that the ballots in the pre-hearing representation vote should not be counted, that the application should be dismissed because the applicant's membership evidence is insufficient to warrant treating the results of the vote as dispositive of this application. If this application were dismissed on that basis, the dismissal would not be "because not more than 50 per centum of the ballots all those eligible to vote were cast in favour of the applicant", to use the language of the *Mathias Ouellette* decision.

11. If this were an "ordinary" application under section 7 and the request for withdrawal had been made in circumstances in which it appeared the application would be dismissed for want of sufficient membership evidence, the dismissal would not ordinarily be accompanied by a bar. Why should the result for this applicant be different because a pre-hearing vote was conducted?

12. It might be said in answer to that question that the conduct of a vote is a disruption which ought not to be repeated. If a major objective of the Board in exercising its power under clause 103(2)(i) were to minimize disruption caused by votes, however, one would expect the Board to refuse to entertain *any* trade union's application if it were filed soon after the post-vote dismissal of another trade union's application. That has not been the Board's practice when there is no incumbent trade union. The Board's willingness to entertain one trade union's application immediately after another's has been dismissed following a vote cannot be explained by focusing on the first applicant's having caused the disruption, as that explanation would have the Board exercising the discretion under clause 103(2)(ii) in a punitive fashion, contrary to the approach described by the Board in *Hydro Electric Commission of Hamilton*, [1958] 58 CLLC ¶18,120, and *The Watson Manufacturing Company of Paris Limited*, *supra*.

13. With respect to its disruptive tendencies, moreover, the simple taking of a representation vote pales in comparison with the disruptive effect a complex and acrimonious certification application may have over a lengthy period, even if no vote is ever conducted. The Board has not treated the disruptive effects of other aspects of a certification application as a reason to impose a bar at the time of dismissal of the application. It is not apparent why the disruptive effect of a vote should be given any special weight, particularly when the ballots have not been counted. Again,

he feature of representation votes on which the Board has focused in explaining why a bar would be imposed is not the disruptive effect of conducting the vote but the fact that employee wishes has been fully tested by means of the vote, as may be further illustrated by the following passage from the Board's decision in *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091, at paragraph 17:

17. ...Except in very extenuating circumstances, the Board's practice with respect to the imposition of a bar against an unsuccessful applicant is exercised only where a representation vote is held and the applicant fails to obtain the necessary majority to be entitled to certification. In such a case, the support enjoyed by the applicant among the employees of the company would be fully tested by a representation vote and the Board will not entertain a new application by the same applicant until such time as the employees have had a chance to properly reconsider their position. The Board does not consider repetitious applications where the membership evidence has been fully tested by a vote to be in the interest of sound Labour Relations.

14. We are aware of decisions in which the Board has responded to a request to withdraw following the conduct of a pre-hearing representation vote and the sealing of the ballot box by both dismissing the application and imposing a bar on further applications: *Devon Dairy Limited*, [1961] OLRB Rep. Dec. 313; *The Bristol Place Hotel*, [1979] OLRB Rep. June 486; *The Wentworth County Board of Education*, [1988] OLRB Rep. Oct. 1132. None of those decisions considered the distinction to which we have referred in paragraph 7 above. Those decisions may be contrasted with the Board's decision in *Sunnybrook Hospital*, [1974] OLRB Rep. Aug. 552, in which the Board refused to impose a bar when an applicant sought to withdraw after a pre-hearing representation vote had been conducted.

15. There is also *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181, where a pre-hearing representation vote had been conducted and the ballot box had been sealed, perhaps because of the existence of the non-pay allegation with which the reported decision ultimately dealt. That allegation was sustained at hearing, leading the Board to reject the applicants' membership evidence and dismiss the application. The Board also imposed a bar without giving any particular reason for doing so. The matter does not appear to have been the subject of any argument. There is no reference to *Watson Manufacturing*, nor any explanation why the only distinction between the two cases - the fact that a pre-hearing representation vote was conducted - should lead to different results. We note that a bar was not imposed in *W. & H. Voortman Limited*, *supra*, where the dismissal was also due to rejection of the applicants' membership evidence.

16. When a trade union commences an organising campaign, it does not know with precision how the Board will define the unit in which it will be required to establish membership support, nor is there a mechanism by which the union can determine in advance the identities or even the numbers of persons whom the employer will say fell within that unit at any particular time. It is not uncommon for trade unions to discover, during the hearing of an application on its merits, that they have underestimated the size of the unit or have been unaware of and not approached a group of employees whose wishes will be taken into account by the Board. If this occurs in the course of an application filed under section 7, the Board's response to a request to withdraw is ordinarily dismissal without a bar. It does not appear to us that an applicant for certification should be put in a worse position merely because a pre-hearing representation vote was conducted at its request. There are, we think, good policy reasons why trade unions should not be discouraged from making such requests: see *U-Need-A Cab*, [1989] OLRB Rep. Mar. 301 at paragraph 5; and, *Goldcrest Furniture Ltd.*, [1989] OLRB Rep. Apr. 355 at paragraphs 11 and 12.

17. No bar is ordinarily imposed when an applicant under section 7 fails to establish sufficient membership support in the bargaining unit to entitle it to a vote or who seeks to withdraw in the face of the possibility of such a failure. In our view, no bar should be imposed on an applicant

under section 9 who is in a similar position, even though a pre-hearing representation vote has been conducted in the meantime. The fact that a pre-hearing representation vote has been conducted should only trigger a bar if it was clear when the request for withdrawal was made that the wishes expressed in the vote would have determined the success or failure of the application. No bar should be imposed by reason of the conduct of a vote where, as here, the applicant seeks to withdraw at a stage when its opponents are saying that it cannot be certified even if a majority of the ballots cast in the vote were cast in its favour.

18. We note that the fact there is an incumbent trade union would ordinarily be given weight (in the industrial context, at least) if a subsequent application were filed and the Board were asked to refuse to entertain it: see the decisions reviewed in *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. Apr. 468. (That factor may or may not be applicable in the construction industry: *Master Insulation Company Limited*, [1981] OLRB Rep. May 546). The weight to be given to this factor can only be assessed in the circumstances which exist at the time a subsequent application is filed, however. Despite the caveat in the passage we quoted earlier from *General Freezer Limited*, *supra*, it does not appear that the existence of an incumbent has ordinarily influenced the Board's decision whether to impose a bar when an application is dismissed.

19. There may be cases, as in "ordinary" applications, in which some further enquiry must be made about the circumstances in which withdrawal was sought before one can say how the Board's discretion ought to be exercised under clause 103(2)(i). Once a request to withdraw is made, however, it makes little sense to engage in a further evidentiary enquiry in order to determine whether to bar further applications. If the propriety of a bar is not clear at the time the request is made, any further enquiry in that regard is best left to be pursued only if and when a subsequent application is filed: *Mathias Ouellette*, *supra*; *Mount Sinai Hospital*, [1985] OLRB Rep. Dec. 1780. We say this recognizing that if a pre-hearing vote were requested in a subsequent application and the prerequisites of subsection 9(2) were satisfied, the Board would ordinarily conduct the vote and seal the box before entertaining evidence and argument with respect to the application of clause 103(2)(i): *The Corporation of the City of Gloucester*, [1989] OLRB Rep. Apr. 352.

20. This application is dismissed without imposition of a bar to further applications and without prejudice to the right of any party affected to rely upon clause 103(2)(i) in the event any further application is filed.

0269-89-U The Art Gallery of Ontario, Applicant v. Ontario Public Service Employees Union, Ontario Public Service Employees Union Local 535, Ted Loughhead, Ed Gorley, Ruth Jones, Carla Roth, Karen Heffernan, Sharon McGill, Elizabeth Khera, Michael Douglas, Mary Greta, Kerry Kim, Catherine Spence, Jill Cate, Gisela Navia, Bud Johnston, Clairra Hargitay, Respondents

Picketing - Strike - Employees picketing during unpaid lunch breaks - Union not in a legal strike position - Picketing not designed to have any impact on the applicant's business - Picketing not in connection with nor constituting an unlawful strike - Application dismissed

BEFORE: G. T. Surdykowski, Vice-Chair.

APPEARANCES: *John Brooks* and *Mary Beth Currie* for the applicant; *Ian Roland*, *David Wright* and *Ted Loughhead* for the respondents.

DECISION OF THE BOARD; May 30, 1989

1. For reasons which follow, this application for declarations and directions under section 92 of the *Labour Relations Act* was dismissed orally after a hearing on April 28, 1989.

2. There was no dispute of substance with respect to the facts material to the application.

3. At the instance of the respondent trade union, (and those of its representatives who are respondents), some employees of the applicant who are in a bargaining unit represented by the respondent trade union picketed in front of the applicant's premises at 317 Dundas Street West, Toronto, on April 26, 1989. They also intended to picket there during the evening of April 28, 1989 in conjunction with a fund raising event being held by the applicant. The majority of those picketing on April 26, 1989 carried signs complaining about the adequacy of the applicant's monetary offer in the then ongoing collective bargaining between the applicant and their bargaining agent, the respondent trade union. It was common ground that the applicant and the respondent trade union were in the conciliation process at all material times, and that the respondent trade union was therefore not in a legal strike position with respect to the applicant.

4. On the evidence and agreed facts before me, I was satisfied that, with the exception of the respondent Gorley, those respondents who were employees of the applicant engaged in the picketing complained of solely during their unpaid lunch breaks. The intended picketing on April 28, 1989 would be by persons other than employees scheduled to be at work. I was satisfied that that part of Gorley's involvement in the picketing which exceeded his lunch period was minimal in extent and did not, on the evidence before me, have any intended or apparent impact on the applicant's operations. I was also satisfied that the picketers did not attempt to persuade any one to not enter or to not do business with the applicant. Indeed, they actively encouraged any persons having business with the applicant or wishing to enter the applicant's premises to do so. The evidence indicated that both patrons and other persons wishing to enter the applicant's premises did so. There is no evidence that any- one did not enter or attempt to enter the applicant's premises because of the picket line.

5. The applicant relied upon a provision in the collective agreement between it and the respondent trade union (which though expired, the applicant submitted was still in effect by operation of the "freeze" provisions in the *Labour Relations Act*) which provides that:

ARTICLE 5 STRIKE OR LOCKOUT

5.01 The Gallery agrees that there will be no lockout of employees, and the Union agrees that there will be no strike, picketing, or other interference with the operation of the Gallery. The words "strike" and "lockout" shall bear the meaning given them in the Ontario Labour Relations Act.

Further, submitted the applicant, the intended and actual effect of the picketing was such that the actions of the respondents constituted a breach of the *Labour Relations Act* in any event. In that respect, the applicant asserted that any picketing carried on by a trade union (or its members) when it is not in a legal strike position is unlawful *per se*.

6. The respondents argued that the picketing was informational and that such picketing is not prohibited by the *Labour Relations Act*. They submitted that there was no evidence of subjective design or objective effect such as to justify a finding that a strike had occurred.

7. In my view, any issue with respect to an alleged breach of a collective agreement is a matter for arbitration and, since it was not disputed that the respondent trade union was not in a legal strike position, was irrelevant to my considerations in any event. Similarly, the alleged breach of section 79 was not material to the application before me either. The issue before me was whether the respondents had engaged in conduct contrary to the *Labour Relations Act*; namely, activity which constituted or threatened an unlawful strike, or which resulted or was likely to result in an unlawful strike.

8. The *Labour Relations Act* recognizes the right to strike. However, that right does not exist during the term of collective agreement or before the conciliation process established by the Act has been exhausted. Section 1(1)(o) of the Act defines a “strike” as something which:

includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

9. “Picketing”, “picket”, and “picket line” are terms which are not specifically mentioned in the *Labour Relations Act*. Nor is picketing, within the common meaning of that term, associated exclusively with labour relations matters (witness, for example, the picketing of various abortion clinics in recent years). However, picketing in this country has long been associated with trade union solidarity and strike activity. Where a lawful strike is in progress, employees are entitled to engage in peaceful picketing of their employer’s business. Most such picketing is designed to induce the public or persons doing business with the employer to not have dealings with it and thereby bring economic pressure to bear on the employer. In Canada, picketing is a traditional method employed by workers to publicize disputes with their employer and to attract support for themselves in that respect.

10. Virtually any form of picketing provides information and has an element of expression in it. A common part of that expression is a suggestion to others that they not do business with the person being picketed. In support of its submissions, the respondent relied upon the Supreme Court of Canada decision in *Retail, Wholesale & Department Store Union, Local 580, et al. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; (1986) 33 D.L.R. 4TH 174. I note that that case, unlike this one, involved secondary picketing. Further, and with great respect to the Supreme Court of Canada’s obiter comments in that respect, it would be, as this case demonstrates, too much of a generalization to say that *all* picketing is designed to put economic pressure on the person picketed and to cause economic loss to him for so long as the object of the picketing remains unfulfilled.

11. It is clear that the motivation for threatening or engaging in an unlawful strike (in the sense of the ultimate goal of those involved with it) is irrelevant (see *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569; application for judicial review dismissed 78 CLLC ¶14,135 (Div. Ct.); *Monarch Fine Foods Company Limited*, [1986] OLRB Rep. May 661). However, in order for a strike to exist at all within the meaning of the *Labour Relations Act*, there must be concerted employee activity designed to restrict or limit output.

12. The mere existence of picketing by employees will almost always amount to concerted activity by them. While it may be, having regard to the *ejusdem generis* doctrine, that not all picketing by employees will constitute “concerted activity” within the meaning of section 1(1)(o) of the Act, it was not argued before me that the picketing in this case did not amount to such concerted activity. In any case, the existence of picketing will not, by itself, mean that a strike is in progress or is likely to result. In order for a strike to exist there must be some concerted activity which was designed to restrict or limit output. (See, for example, *Horton CBI, Limited*, [1985] OLRB Rep.

June 880, where the Board prohibited picketing because it was designed to and did out economic pressure (by restricting and limiting its output) on the employer to change an assignment of work, not because of the informational component of the picketing). Consequently, the motivation for picketing (in the sense of its purpose) may be relevant to the issue of whether or not it constitutes an unlawful strike or other unlawful conduct. (See *Bay Tower Homes Company Ltd.*, [1988] OLRB Rep. March 259).

13. While picketing is often identical to a strike, it is not always so. The Board's mandate is to enforce the prohibition in the *Labour Relations Act* against unlawful strikes and any picketing which is incidental to them. The Act does not authorize the Board to restrain or restrict picketing which is not connected with unlawful conduct. Consequently, the question which the Board must address is not whether there is picketing occurring during the effective period of a collective agreement or before the conciliation process has been exhausted, but rather whether or not the conduct complained of (in this case the picketing) is prohibited by the Act.

14. In this case, there was no evidence that the picketing engaged in (and threatened) was designed to or did have any impact on the applicant's output or business. On the contrary, the evidence established that persons having dealings or wishing to deal with the applicant were encouraged to and did do so. Nor did the evidence establish either that there was any cessation of work or refusal to work or continue to work, or any threat in that respect by the employees. In the result, the picketing complained of neither constituted nor was in connection with an unlawful strike. Nor was I satisfied that any unlawful strike had been authorized, threatened, counselled, procured, supported or encouraged. Accordingly, there was no breach of any of sections 92, 74 or 76 of the Act and the application was dismissed.

1634-87-U International Woodworkers of America, Complainant v. Atway Transport Inc., Respondent

Dependent Contractor - Discharge for Union Activity - Employee - Unfair Labour Practice - Union alleging that grievor was discharged in contravention of Act - Employer arguing that grievor was not an employee but an independent contractor - Employer in business of hauling raw forest products from logging sites to mills - Grievor was a hauling contractor - Whether grievor a dependent contractor and therefore an employee or an independent contractor - Grievor found to be an independent contractor - Complaint dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *J. Sarra*.

APPEARANCES: *W. Dubinsky*, *Edward Kidd*, *Lyle Pona* and *Wilf McIntyre* for the complainant; *Y. L. J. Fricot*, *D. F. Nelson* and *F. J. W. Bickford* for the respondent.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER, R. M. SLOAN;
June 6, 1989

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "Union") alleges that the grievor, Edward Kidd, has been dealt with by Atway Transport Inc. ("Atway") contrary to the provisions of sections 66 and

70 of the Act. The essence of the complaint is that Mr. Kidd was terminated by the respondent in September of 1987 in contravention of the Act.

2. In its reply to the complaint, the respondent submitted that the grievor was not an employee of the respondent but was at all material times an independent contractor. The complainant, on the other hand, contended that the grievor was a dependent contractor and, therefore, an employee for purposes of the Act. At the commencement of the hearing of this complaint on January 6, 1988, the parties agreed that the Board should hear evidence and argument concerning that issue as a preliminary matter. In this regard, it was common ground between the parties that unless the Board found the grievor to have been a dependent contractor at the time of the termination, the complaint could not succeed as the Board would have no jurisdiction to hear it. (For ease of exposition, the present tense is used in parts of this decision to describe various aspects of the respondent's operations, including its relationship with contractors such as the grievor. However, for purposes of clarity, we would note that unless otherwise indicated, the time frame actually covered by the decision is December of 1986 to (and including) September of 1987.)

3. The hearing of the aforementioned preliminary issue continued on March 28, 29, and 30, April 6 and 7, June 6, July 26 and 27, August 16 and 17, September 12, 13, 20, and 21, 1988, and on January 4, 5, 30, and 31, February 9 and 10, and March 7, 28, and 29, 1989. It was initially estimated that the hearing would be concluded in three or four days. However, the hearing was substantially prolonged as a result of a lamentable lack of cooperation on the part of the parties' representatives, combined with an all too frequent failure on their part to exercise good judgment regarding the conduct of the case, which resulted in numerous objections, unnecessary argumentation and delay concerning production of documents, and the introduction of a considerable amount of evidence which is of marginal relevance, at best, to the issue before us. The completion of the hearing was also delayed by the unavailability of the parties' representatives on a number of days which were offered by the Board. For example, when it became apparent in September of 1988 that the hearing would not be completed in the days already scheduled, the Board offered the parties a total of fourteen days during November, December, and January. The parties' representatives were only available on the last two of those fourteen days. Thus, it was necessary to schedule continuation dates in February and March of 1989.

4. During the twenty-four days which were devoted to hearing this matter, the Board heard the evidence of Edward Kidd, the aforementioned grievor; Robert Halstead, the President of Atway; Claude Perrier, the Secretary-Treasurer of Atway; Len Salmi, a Vice-President of Atway and its Trucking Manager; and Joseph Devlin, a principal of Devlin Timber, which is a logging and timber company that has been operating in northwestern Ontario for many years. In addition to the testimony of those five witnesses, the Board has before it sixty-one exhibits which were entered during the course of these proceedings. In making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence (with the exception of the exhibits which were not properly proven after they were received by the Board and marked for purposes of identification on the basis that they would not be given any weight unless they were duly proven). We have also considered the submissions of the parties' representatives concerning that evidence, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

5. The respondent is in the business of hauling raw forest products such as sawlogs and pulpwood in northwestern Ontario. (For ease of reference, those products are generally referred

to as “wood” in this decision.) It is under contract with Buchanan Forest Products Ltd. (“Buchanan”) to haul various types of wood from a number of different logging sites to twenty-two mills in various locations including Hudson, Dryden, Thunder Bay, Kenora, Fort Frances, Nipigon, and Terrace Bay. Buchanan is a timber broker that purchases wood and contracts to sell it to other firms. Buchanan, Atway, and a number of those mills, including the stud mill operated by McKenzie Forest Products Inc. (“McKenzie”) in Hudson, are part of the “Buchanan Group”, which is a fully integrated forest product supply organization involved in many facets of the forest products industry. After Buchanan informs Atway that it (Buchanan) has a contract to sell a certain number of cords to a particular mill, Atway contacts the mill to determine the delivery schedule for that wood. Atway’s hauling is performed by approximately one hundred trucks provided by hauling contractors such as the grievor, and a fleet of about fifty trucks (the “Company trucks”) owned by Buchanan and operated by the respondent pursuant to an agreement with Buchanan. When it is operating on a single-shift basis, Atway usually employs about forty drivers to operate the Company trucks. During double-shift periods, that number can rise as high as eighty. (For ease of exposition, persons who drive Company trucks will be referred to in this decision as “Company drivers”, and the aforementioned hauling contractors will be referred to as “contractors”.) The Company drivers generally work in the Thunder Bay area, but the respondent sends them to Sioux Lookout and other areas from time to time when hauling problems are encountered there.

6. The hauling business that since January of 1987 has been carried on by Atway was previously carried on by Agassiz Transport Inc. (“Agassiz”). Agassiz ceased to operate in January of 1987 as a result of a seizure of its assets (including its bank account) at the behest of the Workers’ Compensation Board (“W.C.B.”), which had billed Atway for an amount in excess of \$250,000 in December of 1986 under a newly adopted experience rating system. During January of 1987, Atway became the registered operator of the aforementioned fleet of trucks which had previously been operated by Agassiz. (To expedite the changeover, a shelf company named “Maverick Transport Inc.” was used, with its name being subsequently changed to “Atway Transport Inc.”) The hauling business carried on by Atway is identical in all material respects to that previously carried on by Agassiz. (Since it is generally unnecessary for purposes of this case to distinguish between them, both Agassiz and Atway will be referred to as the “Company” in this decision.)

7. The respondent’s Sioux Lookout operation is managed by Jim Miller, a Company Vice-President who reports to Messrs. Salmi and Halstead. Mr. Salmi is in charge of the Company’s trucking operations. His office is in Thunder Bay but he has spent a considerable amount of time in Sioux Lookout and is quite familiar with the Company’s operations in that area. As President of the respondent, Mr. Halstead has overall responsibility for the Company’s activities, but confines himself to operational matters, leaving financial matters to Mr. Perrier. Their offices are also in Thunder Bay. Mr. Miller’s office is located in a building in which the Company has a garage in Sioux Lookout. A Company employee named Tony Bortolot assists Mr. Miller by maintaining radio contact with loader operators at loading sites in the Sioux Lookout area. He also orders parts for Company equipment such as graders, bulldozers, and front end loaders, and looks after the stockroom in which those parts are stored. In order to provide hauling conditions which will attract contractors and ensure an efficient haul, the Company employs operators to run that equipment in the Sioux Lookout area. In addition to its garage, the Company also has a bunkhouse in Sioux Lookout where contractors from other areas can reside free of charge.

8. During the hauling season, the Company generally has between twenty and twenty-five contractors engaged at any given time in the Sioux Lookout area, and is almost always looking for more as there is much competition for their services. Because of the contractors’ high mobility and propensity to shift from haul to haul, the Company had to engage a total of more than fifty contractors in the Sioux Lookout area during the course of 1987 in order to have between twenty and

twenty-five engaged in hauling for the Company in that area at most times during the hauling season. Contractors hauling in the Sioux Lookout area generally come from Sioux Lookout, Hudson, Dryden, Fort Frances, Kenora, and Ignace. However, some also come from Manitoba and Quebec at the behest of Mr. Salmi, who travels to various locations in northwestern Ontario and beyond the Province in order to attract contractors to haul for the Company. Company trucks are not usually used in the Sioux Lookout area except when there is a severe shortage of contractors, or when the Company and the contractors are unable to agree upon a mutually satisfactory rate for a particular haul.

9. Mr. Kidd has worked in the raw forest products industry for approximately nineteen years. He was born and raised in Sioux Lookout and has worked in that area for most of his life. Prior to hauling for Agassiz in 1986, Mr. Kidd (and a partner) operated a timber broking business under the name Northwest Logging Co. ("Northwest"). Northwest bought, sold, and loaded various types of wood for delivery to various customers. As part of that business, Mr. Kidd operated a bulldozer which he owned at that time. He also owned a loader, but sold it in the spring of 1986. Northwest paid a fixed rate per cord to contractors for hauling wood to its customers, and operated in competition with Agassiz for the contractors' services. Since the movement of contractors back and forth between Agassiz and Northwest became so frequent as to make it infeasible for both of them to operate at the same time, Mr. Kidd and Mr. Halstead (as President of Agassiz) arranged for contractors to haul for Agassiz from Monday to Wednesday, and for Northwest from Thursday to Saturday. Prior to becoming a partner in Northwest, Mr. Kidd ran his bulldozer and loader for another company, pursuant to contracts with that firm. Over the years, he bought and sold a number of different trucks which he used to haul lumber and gravel for various companies.

10. When Mr. Kidd ran out of work for his bulldozer in the fall of 1986, he put it up for sale and decided to seek work as a trucker. He did not approach any of the firms in the Sioux Lookout area which employed drivers because he wanted to drive his own truck and to be in business for himself, rather than driving someone else's truck. Mr. Kidd was familiar with Agassiz's operations in the Sioux Lookout area as he had hauled for them as a contractor for about a year and a half in the late 1970's, before leaving to look after a gold extraction operation in Costa Rica.

11. In December of 1986, Mr. Kidd went to Agassiz's garage in Sioux Lookout and asked Jim Miller about the possibility of hauling for Agassiz. Mr. Miller's response was "Buy a truck and I'll give you a job", or words to that effect. Mr. Kidd then obtained a bank loan to finance the purchase of a tractor for \$52,500 and a trailer for \$11,500. (For ease of reference, we will refer to that tractor-trailer unit as Mr. Kidd's "truck", in accordance with the practice which has been adopted herein of using that term to include various types of equipment used to haul raw forest products.) Having previously owned hauling equipment, Mr. Kidd was aware that a number of different factors had to be taken into account in selecting such equipment, including the purchase price and condition of the equipment, as well as fuel, repair, maintenance, and insurance costs. Mr. Kidd considered all of those factors in deciding what to purchase, and also considered the revenue that he would likely be able to generate on the basis of the Agassiz haul rates which he had heard about from other persons who hauled for Agassiz. He acknowledged in cross-examination that the factors which he took into account in deciding whether or not to purchase that tractor and trailer were "business considerations" relevant to whether or not he could make a profit hauling for Agassiz.

12. After purchasing the truck, Mr. Kidd met again with Mr. Miller and "signed a piece of paper" which Mr. Miller told him was a contract with Agassiz. Neither party was able to provide the Board with that document. However, nothing turns on whether Mr. Kidd did or did not sign a written contract, as it is clear from the evidence that the relationship between contractors and the Company is the same regardless of whether or not they sign a written contract. Moreover, the evi-

dence also indicates that the actual relationship between the contractors and the Company is at variance with a number of the provisions contained in the standard form contract which the Company was using at that time.

13. Mr. Miller provided the grievor with a list of the rates paid by Agassiz for various hauls and arranged for him to obtain a fuel key for use in the Company's key-lock system. Mr. Kidd gave Agassiz a \$150 deposit for that key which enabled him to obtain diesel fuel for his truck at a Company pump. He was under no obligation to use that fuel but chose to do so (instead of buying fuel elsewhere) because of the relatively low price of that fuel, which was offered to contractors at a price set by the Company annually, based on volume buying. That system of setting the price of Company fuel on a yearly basis was introduced in the early 1980's when rapid variations in fuel prices were creating a need for constant renegotiation of the price per cord paid by the Company on various hauls. The cost of the Company fuel used by Mr. Kidd's truck was deducted from the cheques which he received from the Company for hauling wood.

14. On Mr. Kidd's first day of hauling for Agassiz, Mr. Miller told him to go to a loading point (called the Idaho) about sixty kilometres north of Sioux Lookout for his first load. After loading Mr. Kidd's truck with eight-foot saw logs, the loader operator gave him a load slip which showed the destination of that load to be the McKenzie mill in Hudson, which is approximately twenty-five kilometres west of Sioux Lookout. When Mr. Kidd arrived there, an employee of the mill measured the volume of the load and provided Mr. Kidd with a scale slip for use in obtaining payment from the Company. After his truck had been unloaded, Mr. Kidd returned to the Idaho for another load, which he also delivered to that mill, thereby completing his shift for that day.

15. In order to increase his income, when Mr. Kidd began to haul for the Company he decided to have his truck operate on a double-shift basis. Mr. Kidd drove the truck on the night shift and arranged for an individual from Hudson named Marcel Lacasse to drive it on the day shift. The decision to have Mr. Lacasse drive the truck was entirely Mr. Kidd's; the Company had no input into the selection of Mr. Lacasse. The evidence indicates that Mr. Kidd was free to choose whomever he wished to drive his truck, and that he was under no obligation to drive it himself. Thus, he had the option of confining the vehicle to a single shift with Mr. Lacasse (or anyone else whom he wished to use) as the driver. However, he chose to operate his truck on a double-shift basis and to drive it himself on one of the shifts in order to make more money. Mr. Kidd paid Mr. Lacasse \$70 a trip, and "put him on as a subcontractor" for whom he did not make any unemployment insurance, income tax, Canada Pension Plan, or other deductions. That arrangement continued from the time at which Mr. Kidd started to haul for the Company until the Company's loading operations were reduced to a single-shift in March of 1987. During that period, Mr. Kidd paid Mr. Lacasse a total of \$5,390.00 for seventy-seven trips.

16. When Mr. Miller became aware that Mr. Kidd planned to operate his truck on a double-shift basis, he advised Mr. Kidd that he (Mr. Kidd) would need a "compensation number" from the W.C.B. The evidence indicates that it was necessary for Mr. Kidd to obtain such a number because of his decision to pay Mr. Lacasse to drive the truck on the other shift. In this regard, it was Mr. Perrier's uncontradicted evidence that, in the logging industry, it is the policy of the W.C.B. to deem a contractor to be an employee of the principal with whom he contracts so long as the contractor is the only operator of the vehicle. (Mr. Perrier also advised the Board that the Company was challenging the validity of that policy through W.C.B. appeal proceedings.) However, if a contractor pays someone else to drive his vehicle, the contractor is no longer treated by the W.C.B. as being an employee, but rather as being an employer who must register with the W.C.B. and obtain a registration number in order to provide Workers' Compensation coverage for the other driver. Such a contractor has the option of also obtaining Workers' Compensation cover-

age for himself, but Mr. Kidd elected not to do so, thereby reducing his Workers' Compensation expense but assuming the risk of uncompensated injury.

17. With the assistance of his accountant, Mr. Kidd obtained a Workers' Compensation number by paying \$641.00 (based upon the general trucking rate of \$6.41 per \$100.00 of estimated payroll for 1987, rather than the log hauling rate of \$15.12 per \$100.00 of estimated payroll for 1987). Under the provisions of the Workers' Compensation Act, the W.C.B. can obtain payment from the Company in the event that a contractor fails to make the required payments to the W.C.B. To protect itself against this potential liability, the Company deducts fifty cents per cord from the amount payable to the contractor. If the Company subsequently receives a clearance from the W.C.B. (indicating that the required payments to the W.C.B. have been made by the contractor), it pays to the contractor the amount which has been withheld. Mr. Kidd did not receive that payment from the Company as the W.C.B. declined to issue a clearance certificate in respect of him because he was not reporting under the proper rate. Thus, the Company has continued to hold back those funds for possible future remittance to the W.C.B.

18. It generally takes about half an hour to load a truck. To reduce waiting time at the loader, the contractors follow a schedule which Mr. Miller posts every week at the Company's garage in Sioux Lookout. That schedule indicates the time at which each of the contractors is to go to the loader for his first load of the week. When the Company is running on a single shift basis, that same time applies each day. On double-shifts, the trucks run continuously from the time of the first load to the end of the week, since each shift lasts twelve hours. Mr. Miller prepares that schedule without consultation with individual contractors. If any Company trucks are hauling in the Sioux Lookout area, they will also be included on the schedule. Adherence to the schedule by Company drivers is monitored by the Company, but there is no monitoring of the degree to which contractors adhere to it as the schedule is provided for the contractors' convenience, and not as a means by which the Company seeks to exercise control over them. As requested by the mills to which raw forest products are delivered, the Company assigns a vehicle number to each of the contractors' trucks and to each Company truck, in order to simplify computer entries concerning deliveries.

19. In addition to hauling to the McKenzie mill in Hudson, the grievor also hauled wood to Dryden and to Thunder Bay from the Idaho and other loading sites, in accordance with instructions received from Mr. Miller or loader operators at the loading sites. Mr. Kidd initially testified that he had no choice concerning the type of wood to be hauled nor concerning the hauling destination. In this regard, he told the Board (during examination in chief), "You take it or you go home.... [If you refuse] you don't get a load." Mr. Kidd further testified that if a contractor refused to take a load on a particular run he would be "fired". However, he later conceded that he did not know of any contractor who had been terminated for refusing to take a load. He also acknowledged in cross-examination that contractors sometimes refuse to accept a load destined for one location and elect to wait for a load going somewhere else. This was but one of several instances in which sweeping statements which Mr. Kidd made during his examination in chief were contradicted or significantly qualified in cross-examination, thereby demonstrating that Mr. Kidd had not initially been entirely candid with the Board. Those instances, together with the evasiveness and forgetfulness which Mr. Kidd displayed in some parts of his testimony, have led us to conclude that we should not rely upon Mr. Kidd's evidence where it is inconsistent with other evidence concerning the Company's operations, including its relationship with contractors such as the grievor. In this regard, we find no merit in the Union's contention that the relationship between contractors and the Company in Sioux Lookout differed from the Company's relationship with contractors in other areas. Having regard to the totality of the evidence, we are satisfied that the

relationship between contractors and the Company is substantially similar throughout the Company's operations in northwestern Ontario.

20. In March of 1987, with the onset of half-load restrictions (necessitated by the Spring thaw) which made hauling impracticable in the Sioux Lookout area, Mr. Kidd was requested by the Company to go to a loading site (known as "Block 3") approximately 120 kilometres northwest of Thunder Bay to haul wood from that site to the Great Lakes Forest Products Mill in Thunder Bay. Mr. Kidd remained there for about a week the first time, and later returned for a few more days. Hotel accommodation in Thunder Bay was provided at no cost to Mr. Kidd and other contractors who came to Thunder Bay to assist with that haul. The provision of this accommodation served as an incentive for contractors from outside Thunder Bay to come there and participate in that haul along with contractors from the Thunder Bay area who would not incur any extra expense for accommodation. It also avoided any need to revise the haul rate in order to attract additional contractors. The Company deducted from Mr. Kidd's cheque the cost of the two extra nights that he remained at the hotel after the haul was completed. Mr. Kidd subsequently deducted that cost as a business expense for income tax purposes. Although Mr. Kidd initially suggested that he had no choice but to work on that haul, he subsequently acknowledged in cross-examination that he chose to participate in it because he saw a chance to make some extra money while the haul was shut down in the Sioux Lookout area. Some of the other contractors who were given that opportunity chose not to participate. After he returned to Sioux Lookout from Thunder Bay, Mr. Kidd told Mr. Miller that he was "going to Indianapolis and wouldn't be there for two weeks". Although Mr. Kidd later suggested in his evidence that a contractor cannot take a vacation without Mr. Miller's permission, his description of what he told Mr. Miller concerning that vacation is inconsistent with needing any such permission. Following his vacation, Mr. Kidd resumed hauling for the respondent.

21. The grievor also hauled wood to Thunder Bay from a stock pile at the McKenzie mill in Hudson. He did not solicit that work, but only hauled for McKenzie when Mr. Miller asked him to do so. Mr. Kidd was paid by McKenzie for some of those hauls and by the Company for others. On one of those trips he was requested by McKenzie to transport a blower from another sawmill to the McKenzie mill on his return trip. The grievor also "took something back" to the Company's Sioux Lookout garage on a return trip from Thunder Bay, at the request of Mr. Miller.

22. Mr. Kidd's truck bore only his own name and, unlike the Company trucks, did not have the Company name or logo on it. During cross-examination Mr. Kidd agreed with the suggestion by respondent's counsel that it "wouldn't make a lot of sense to go out and have an Atway sign put on the truck because it's [his] truck and [he's] in the business".

23. The grievor was paid by the Company on the basis of volume of wood hauled. No payment was made for waiting time. To obtain payment for hauls, he provided the Company with a trip report and scale slips on a bi-weekly basis. The trip report listed all of the hauls for which he was seeking payment and specified, for each haul, where the wood was picked up and the location to which it was hauled. In the absence of a trip report, it was sometimes impossible for the Company to determine the proper rate to apply, because the scale slip did not generally refer to the source of the wood other than by means of a Ministry of Natural Resources ("M.N.R.") approval number, which could cover more than one loading site. When Mr. Kidd neglected to provide a trip report along with the scale slips which he submitted to the Company in June of 1987, Holly Cherry, who is a payroll clerk in the Company's Thunder Bay office, wrote the following note to him (on a scale summary dated June 12, 1987): "Please fill out trip report and hand in with time!" (The evidence indicates that "time" is a generic term used by the Company's payroll staff to refer to various indicators of monetary entitlement, such as scale slips submitted by contractors.) When the

grievor again neglected to do so later that month, Ms. Cherry wrote the following note to him (on a scale summary dated June 26, 1987): "Please fill out Trip Reports! Next time #4 no pay \$4 !" Mr. Perrier told the Board that Ms. Cherry was not instructed to write those words but merely did so on her own in attempting to convince Mr. Kidd to hand in trip reports. He also testified that the Company has never in fact refused to pay contractors without a trip report, although it has paid the lower of two possibly applicable rates in the absence of a trip report clarifying which rate should be paid.

24. Mr. Kidd was initially paid by Agassiz, but in January of 1987 he began to receive cheques from Atway after Agassiz's assets were frozen at the behest of the W.C.B. Atway assumed Agassiz's contract with Mr. Kidd and other contractors who had been hauling for Agassiz. Mr. Kidd continued to haul under the same terms and conditions, and did not discuss the change from Agassiz to Atway with Mr. Miller or anyone else from the Company.

25. The Company gave its contractors the option of obtaining life insurance coverage under its group plan. In May of 1987 Mr. Kidd requested such coverage. Thereafter, a monthly premium of \$5.70 was deducted from his cheques. As persons associated with the Buchanan Group, contractors were eligible to apply for coverage under a Blue Cross Health Plan which provided dental, prescription, and supplemental health care benefits. However, if they elected to enrol in that plan, they were responsible for paying their own premiums. Mr. Kidd did not enrol in that plan.

26. In income tax returns prepared for him by his accountant, Mr. Kidd was described as a self-employed equipment operator. With the assistance of his accountant, Mr. Kidd took advantage of a number of deductions available to self-employed persons but not to employees. In addition to the aforementioned truck, the assets covered by the grievor's balance sheet included a shop where he parked and repaired it, a half-ton truck which he used for getting tires and other parts for it, and a welder and other tools which he used to make those repairs. The evidence indicates that trucks used for hauling raw forest products break down fairly frequently. Thus, one of the factors that affected how much profit Mr. Kidd made as a hauling contractor was repair costs. Mr. Kidd reduced such costs by using those assets to perform some of his own repairs.

27. While he was hauling for the respondent in the Spring of 1987, Mr. Kidd was contacted by a firm from Florida that was interested in obtaining lumber from the McKenzie mill in Hudson. Following that contact, Mr. Kidd spoke with people at the mill to see what arrangements could be made. He considered purchasing or leasing a flat-bed truck for use in hauling the lumber from the mill to Ignace, where it could be loaded onto railway cars for shipment to Florida via rail. Mr. Kidd told the Board that if the proposal had gone ahead, he might have obtained another truck and left the original one on the Atway haul with someone like Mr. Lacasse driving it. However, no such arrangements were made as Mr. Kidd never heard any more from the Florida firm.

28. The grievor is one of several hundred hauling contractors in northwestern Ontario. Many of them have only a single truck, but some have between two and fifteen trucks. The respondent has numerous competitors which vie with it for hauling contractors' services. In this regard the evidence indicates that there is a chronic shortage of contractors in northwestern Ontario and that contractors move about that area quite freely, seeking the best rates and hauling conditions. As indicated above, contractors also move in and out of northwestern Ontario from Manitoba and Quebec. It was Mr. Halstead's uncontradicted evidence that there is a high turnover rate of contractors under contract to the respondent. He told the Board, "If we start a haul up on a Monday morning and send ten [contractors'] trucks to the haul, by Tuesday there's usually only six hauling. [The others] have gone somewhere else." He further testified that if contractors think that a better haul is available elsewhere, they will leave for a month, a week or two, or even a few days. The

Company does not take any action against such contractors other than to confront those who continue to use fuel obtained from the Company pump and tell them, "When you're using our fuel, haul for us and not for anyone else." Some contractors decline to accept a Company fuel key or card because they intend to continue hauling for various competitors. Contractors do not generally contact the respondent when their trucks break down or when they decide to haul for another firm. Unlike Company drivers, contractors are under no obligation to check in with the Company after each trip, and they do not do so. Most of the contractors who leave to work on other hauls later return to haul for Atway. Others, such as the grievor, choose to haul only for the Company because they find the rates and road conditions to be satisfactory, appreciate the relatively continuous availability of work, and wish to remain close to home. Some contractors haul for more than one company during the course of a day or week. Sometimes a contractor will work for a few days and then take some time off without contacting the Company. If this results in a shortage of hauling capacity, the Company will send in Company trucks to cover the shortfall, but will not take any disciplinary or other adverse action against the contractor.

29. Contractors select, purchase, and finance their own trucks without any input or assistance from the Company. The Company never advances money for the purchase of a truck by a contractor, nor does it become otherwise involved in the purchase. (In 1985 Agassiz did agree to make deductions for remittance to another company in respect of a rental/purchase agreement for trailers supplied by the other company to approximately six contractors, but Mr. Kidd was not involved in any such arrangement.) Contractors' vehicles are licensed and registered in the names of the contractors, and not in the Company name. Contractors make their own arrangements for insurance and licences, and pay all insurance and licensing costs, with the exception of "tree length" permits. The Company reimburses contractors who obtain "tree length" permits to haul for the Company pursuant to an arrangement with the contractors based on the fact that "tree length" wood is only hauled sporadically and requires a special permit. (The evidence also indicates that such wood is difficult to haul and that contractors generally refuse to haul it, thereby necessitating the use of Company trucks and drivers.) The Company has no input into or control over the amount and type of insurance coverage which a contractor chooses to have on his truck. Other than in emergency circumstances in which the Company occasionally agrees to purchase parts for a contractor who has had a major breakdown, and then deducts the cost of the part from future cheques, the Company has no involvement in the repair and maintenance of contractors' vehicles, nor does it have any control over who drives those vehicles and the manner in which they are driven. No one from the Company exercises any control over the amount of wood a contractor chooses to have loaded on his vehicle, nor over the way in which the wood is loaded. The amount of wood to be loaded on a contractor's vehicle is left entirely up to the contractor, as are the steps, if any, which he takes to secure or resecure his load while en route to the delivery point. Unlike Company employees, contractors are not required to and do not contact the Company after unloading at a mill. They merely return to the loading site, go to a different loading site (if that is their preference), or proceed to haul for another firm. If the load on a contractor's truck is over-height or overweight, the contractor pays any resulting fines and is responsible for making his own arrangements to have the excess wood removed from his truck. Contractors are under no obligation to report accidents to the Company, and the Company does not investigate contractors' accidents nor become involved in moving or repairing their vehicles after an accident. As indicated above, contractors can hire whomever they wish to drive their trucks. The Company is not involved in the selection or retention of contractors' drivers, nor does it exercise any disciplinary or other control over them. Contractors are not bound by any of the Company rules which apply to Company drivers. The Company's disciplinary procedures apply only to Company drivers, and have no application to contractors.

30. As indicated above, contractors are paid on the basis of the volume of the wood which

they haul. There is a set rate per cord (or per cubic metre) for each haul in which contractors are involved. Rates vary from haul to haul, depending on road conditions and the length of the haul. When a new haul begins to operate, or the loading site on an existing haul is moved substantially further into the bush or closer to the mill, the Company generally offers a new rate on a trial basis. Negotiations with contractors, usually through one to three spokesmen, occur during the following ten days, after which the Company establishes a rate that remains in effect until the contractors are able to persuade the Company to revise it. In this regard, it was Mr. Halstead's evidence that there is continual pressure from the contractors to increase rates. However, the negotiation process does not always lead to an increase in rates. When Mr. Miller called a meeting of the contractors in the Spring of 1987 to discuss hauling rates, the contractors asked for more money and told him how much they thought they needed. Mr. Miller said that he would take their request to Company officials in Thunder Bay to see what could be done. When he returned from Thunder Bay, Mr. Miller told the contractors that there was going to be a cut in the rates on some of the hauls. However, it is unclear from the evidence whether any such cuts were actually implemented. Matters discussed during rate negotiations include distances, types of wood to be hauled, road conditions, loading speed, and accuracy of scales. If contractors feel that a rate is too low, they will generally stop working on that haul. Thus, if the Company wishes to move that wood, it will either have to raise the rate or find an alternative means of hauling it, such as shipping it by rail or using Company trucks and drivers to haul it.

31. Contractors are not paid for waiting time, nor are they paid for statutory holidays or vacations. No statutory deductions are made by the Company in respect of contractors. As indicated above, the cost of the Company fuel used by a contractor is deducted from his cheque, as is the cost of life insurance if he opts to be covered by the Company's group life insurance plan. Union dues are also deducted at the request of some of the contractors and forwarded to Buchanan for remittance to the Lumber and Sawmill Workers Union. However, no such dues were ever deducted in respect of Mr. Kidd. If the Company wishes to have contractors haul out of a different location, it sometimes pays the cost of their accommodation in order to make it economically feasible for them to perform that work (as occurred in respect of the aforementioned haul from Block 3 to Thunder Bay). When the Company has a large volume of wood to move, it sometimes offers financial incentives designed to make it financially attractive for contractors to operate on a double-shift basis. However, the decision whether to operate on a single or double-shift basis remains that of each individual contractor. In making that decision, the contractor must weigh the potential extra income against such factors as the cost of hiring a driver, the cost of Workers' Compensation coverage for the driver, the increased risk of accident or vehicle breakdown, and the extra wear and tear on his truck. In addition to the aforementioned stable and relatively low fuel price which it offers to contractors, the Company also attempts to attract and retain contractors' services by having graders and sand trucks in operation to improve road conditions around loading sites, and by having haul tractors at those sites to assist in moving stuck vehicles.

32. If a contractor manages his operations well and operates on a double-shift basis, he can gross as much as \$200,000.00 a year. Contractors who choose to operate on a single-shift basis generally gross between \$100,000.00 and \$125,000.00. If a contractor manages his operations poorly or has bad luck regarding accidents and repairs, there is a definite risk of loss. Indeed, some contractors have had to declare bankruptcy.

33. As a result of public and governmental concern generated by a number of serious accidents, safety has become a major issue for the respondent and most other companies and individuals involved in hauling raw forest products. In an effort to remedy the situation and avoid direct governmental intervention, representatives from local safety committees, along with representatives from various associations and branches of government, formed an *ad hoc* committee (which

later came to be known as the Northern Ontario Log Trucking Association ("N.O.L.T.A.") Committee) to develop proposals to ensure that logs would be transported safely. The committee formulated sixty-nine recommendations, which came to be known in the industry as the "69 rules", although not all of the recommendations were implemented. One of the recommendations that was not implemented called for all companies that own or "hire" haul units to ensure that each driver has a valid classified licence before going to work. When the respondent and other companies attempted to implement that recommendation in respect of contractors and their drivers, the contractors refused to provide the necessary information on the ground that it was none of their business who was driving contractors' trucks. Other recommendations which were followed in respect of Company drivers but could not be implemented in respect of contractors due to resistance on their part included those pertaining to reference checks, orientation, examinations, and road testing.

34. Copies of the "69 rules" were provided to the Company (and other firms) for distribution to contractors and Company drivers. Mr. Salmi forwarded some of those copies to Mr. Miller in Sioux Lookout for distribution to contractors. A monitoring committee, comprised of representatives from local safety committees, monitored the implementation of the "69 rules", which were enforced against contractors primarily by the mills to which they delivered. If, for example, a contractor arrived at a mill with an unsafe load, he would not be permitted onto the mill's property to unload until he had rectified the situation. If a contractor continually ignored the "69 rules", he could be sanctioned by means of "time off" during which mills, at the instance of the local safety committee, would refuse to accept any loads from him. If a member of management saw a contractor operating in a careless manner, he would report the contractor to the local safety committee, regardless of whether the contractor was hauling for the respondent or for another company.

35. One safety matter of particular concern to residents of Sioux Lookout was the danger posed by trucks with overheight loads hitting the Sioux Lookout railway underpass and spilling part of their load. To remedy this problem, the Sioux Lookout safety committee (which included in its membership Mr. Miller and representatives of McKenzie, the Ministry of Transportation (the "M.O.T."), the M.N.R., the O.P.P., and the Sioux Lookout Town Council) formulated the following procedure. If a contractor carrying an overheight load failed to remove all the wood which spilled from his vehicle as a result of hitting the underpass, the company for which he was hauling would deduct \$200.00 from his cheque to cover the average cost incurred in cleaning up such a spill. The respondent accepted and implemented that procedure in order to assist the committee in dissuading contractors from creating a safety hazard by overloading their trucks.

36. Mr. Kidd testified that Mr. Miller occasionally called safety meetings which he wanted contractors to attend. Mr. Kidd and most of the other contractors in the Sioux Lookout area attended those meetings, although he acknowledged that "sometimes some guys didn't show up" and conceded that to the best of his knowledge nothing had ever happened to persons who failed to attend. At those meetings Mr. Miller and other persons from the local safety committee stressed the need for safety.

37. As noted above, in addition to the approximately one hundred trucks provided by contractors, the Company has a fleet of trucks which are driven by Company drivers who are unquestionably employees of the Company. Unlike contractors, the Company drivers have no financial interest in the vehicles which they drive. The Company arranges and pays for licensing, insuring, maintaining, and repairing Company trucks. Persons seeking to become Company drivers are required to fill out a detailed application form and to provide references. They also must take and pass a written driving test (similar to the one given by the M.O.T. in respect of Class "A" licences). That test is administered by Mr. Salmi. The Company contacts the M.O.T. by telephone

to ascertain the number of demerit points which the employment applicant has accumulated, and to verify that he has a valid Class "A" licence. If the individual has six or more points against his licence, the application proceeds no further. If he has between two and five points, the Company defers any further consideration of his application until after it obtains a written driver's licence abstract from the M.O.T. If that abstract demonstrates that the points were accumulated as a result of minor infractions that do not demonstrate poor driving habits, or if an applicant has no points against his licence, the Company proceeds to give him a road test to test his driving skills. If he passes that test, he is given a booklet containing sixty-five Company rules concerning safe operating procedures. Those rules cover such matters as the protective equipment to be worn by Company drivers, pre-trip inspection of vehicles, fueling, loading, preparing loads for transport, delivering loads, unloading, and parking. They also specify what a Company driver must do if he is involved in an accident. After reading those rules over in the presence of Mr. Salmi who answers any questions he may have concerning them, the new driver is required to sign a copy of that booklet to acknowledge that he is aware of all of the rules and will abide by them. He is also provided with a copy of the booklet for future reference. An employment file is then opened for him and the signed booklet is filed in it along with a photocopy of his driver's licence. The new driver is then given a tour of the Company's Thunder Bay shop and introduced to its mechanics. Following that tour, the Company's dispatch system is explained to him and he is shown how to record his hauling trips and other activities for purposes of payment.

38. Company drivers are paid a set amount per trip, regardless of the volume of wood hauled. The respondent has haul foremen at the loading sites to ensure that Company trucks are safely and efficiently loaded. The amount of wood to be loaded on a Company truck is determined by the Company. If the load on a Company vehicle is overheight or overweight, the Company is notified by the M.O.T. or the O.P.P. and takes steps to remedy the situation, such as sending out one of its self-loading trucks to unload some of the wood. Any fines imposed as a result of a load on a Company truck being overheight or overweight are paid by the Company. If poor weather or road conditions lead a haul foreman to believe that it is unsafe to haul, he can stop Company trucks from operating. However, he has no authority to stop a contractor's vehicle. The decision as to whether or not to continue operating is made by the contractor and not by the Company. When Company drivers are delayed by circumstances beyond their control, such as truck or loader breakdown, they are paid an hourly rate. They are also paid by the hour for time spent changing tires, washing Company trucks, helping mechanics with repairs, and cleaning up the Company yard. Full-time Company drivers generally gross about \$35,000.00 per year. They are paid for statutory holidays and also receive vacation pay. The Company makes the usual statutory deductions for unemployment insurance, income tax, and Canada Pension Plan, and also makes deductions for life insurance coverage (which is mandatory for all Company drivers), and for coverage under the Blue Cross Health Plan (for those employees who opt for such coverage). The Company pays the cost of O.H.I.P. coverage for all Company drivers. Union dues are also deducted from employees' wages where such deductions are requested by the employees. As in the case of union dues deducted at the request of contractors, the deducted dues are forwarded to Buchanan for remittance to the Lumber and Sawmill Workers Union. Company drivers do not pay fuel costs or any other of the other costs involved in operating, repairing, and maintaining Company trucks. When Company drivers are temporarily based outside of Thunder Bay, the Company pays for their accommodation and also gives them \$20.00 a day for meal expenses.

39. Company drivers are dispatched by a Company dispatcher pursuant to schedules prepared by Mr. Salmi. Each Company driver is required to apprise himself of his place on the weekly schedule, and to call the Company approximately one hour before his scheduled departure time to confirm that his vehicle is operational. Upon arriving at the yard to begin his shift, he must report to the dispatcher, who checks to ensure that he is wearing safety boots and a hard hat, and that he

is not under the influence of alcohol. The dispatcher also informs the Company driver of any changes in the haul schedule and of any adverse weather conditions of which he is aware. After speaking with the dispatcher, the Company driver is required to do a "circle check" of the vehicle that he has been assigned to drive, which involves checking its oil, water, lights, wipers, horn, and air lines, as well as ensuring that it has all of the proper safety equipment aboard. He must then drive to the gate, bring the vehicle to a full stop, check for last minute instructions, and proceed to the loading site to which he has been directed. Upon arriving at the loading site, the Company driver must report to a haul foreman or site mechanic any mechanical difficulties encountered on the trip to the site. A Company driver must take whatever load is given to him; unlike a contractor, he cannot park his truck and wait for a different load. He must also obey all directions given to him by dispatchers, site foremen, and site mechanics. If a Company driver fails to comply with such instructions or with Company rules, he may be disciplined by the Company. Disciplinary action ranges from verbal warnings for minor infractions to discharge for serious misconduct, with suspensions being given for intermediate matters or repeated minor infractions.

40. After the vehicle has been loaded, the Company driver must tie down and trim his load and then do a "mini circle check" of his vehicle (i.e., a shortened version of the aforementioned "circle check"). He then proceeds to the first check point, where he is required to resecure his load before driving to the second check point, at which he must drive his truck through load liners before entering the highway. After arriving at the mill, having his load weighed (or measured) and unloaded, and receiving a scale slip, he must telephone the Company dispatcher to advise of his location and receive further instructions regarding matters such as whether he is to return to the same loading site or to proceed to a different loading site to obtain his next load. If the truck is being operated on a double-shift basis, the Company driver must telephone the cross-shift driver before leaving the mill after his last trip and returning to the Company yard (unless he knows that there is a mechanical problem with the unit, in which case he must telephone the dispatcher to inform him of the situation). Following his final trip for the shift, a Company driver must return to the yard, fuel up the truck, park it in its designated parking spot, and fill out a repair requisition form (indicating the nature of any necessary repairs). Company drivers are expected to complete a specified number of trips per shift, depending on the length and conditions of the routes to which they are assigned. They have no choice as to the trucks they drive, the hauls they drive them on, or the shifts on which they work. The Company rotates their shifts weekly when it is operating on a double-shift basis.

41. The Company obtains a driver's licence abstract from the M.O.T. for each Company driver, and updates that information three or four times a year to keep abreast of any changes in their driving records. No such information is obtained in respect of contractors. Management also uses a tachometer card system to monitor Company drivers. Each Company truck is equipped with a unit into which a tachometer card is inserted from time to time to enable the Company to monitor driving speeds, length of stops, and other aspects of the manner in which the vehicle is being driven. If the cards show infractions such as speeding or "over revving the engine", disciplinary action will be taken. No tachometer card or other monitoring system is used in respect of contractors.

42. The Company holds general safety meetings three times a year at which attendance is mandatory for Company drivers. At those meetings Company officials review the Company safety rules and apprise Company drivers of any new developments that have occurred regarding safety. There is also an open forum discussion of safety matters raised by the drivers. Contractors do not attend those meetings, nor are they involved in the "mini-meetings" which Mr. Salmi holds from time to time with small groups of Company drivers to go over specific safety matters. In 1987 the Company arranged for all of its Company drivers to take a defensive driving course. A mandatory

five segment course called "The Fifth Wheel" was also held exclusively for Company drivers. Any Company drivers who failed to attend lost a day's pay as a disciplinary measure. If a Company driver is involved in an accident, he must notify the Company as soon as possible. Upon receiving such notice, Mr. Salmi proceeds to the accident site to investigate the matter by taking measurements, photographs, and statements. He then arranges for the truck to be repaired after its load has been transferred to another vehicle.

43. Section 1(1)(i) provides that, in the *Labour Relations Act*, "'employee' includes a dependent contractor". Section 1(1)(h) defines that term as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

44. The history and purpose of that provision were described by the Board as follows in *Airline Limousine*, [1988] OLRB Rep. March 225:

64. The term "dependent contractor" is of relatively recent origin. It was introduced into Ontario's legal lexicon by Professor Harry Arthurs in 1965 to describe individuals whose economic situation resembles that of an independent entrepreneur in some respects, but, when viewed in its totality, really involves a degree of subordination and economic dependence more closely resembling that of an employee. (See: H. W. Arthurs: *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965) 16 University of Toronto Law Journal 89.) Then, as now, the distinction between employment and "self-employment" could be legally significant. Important rights, or statutory protections could turn upon the label attached to the particular economic relationship. The designation "employee" led to certain legal results. The designation "independent contractor" led to others. Classification was important. A "contract of service" was considered to be very different from a "contract for services"; and adjudicators therefore struggled to analyze and distinguish the two - all the while recognizing that there was no "litmus test" for deciding the question. The distinction between employment and self-employment is genuinely fluid, and difficult to draw at the margins.

65. In this area of legal ambiguity the Courts have considered a variety of factors, including the so-called "four-fold test" enunciated in *Montreal v. Montreal Locomotive Works Ltd.* [1946] 1 D.L.R. 161, where Lord Wright examined "a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss", then added:

...In many cases the question can be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

Others suggested an "organization test" according to which an individual would be said to be an employee if s/he was really "part and parcel of the [alleged employer's] organization" (*Bank Voor Handel En Scheepvaart N.V. v. Slatford* [1952] 2 All E.R. 956); or was "integrated into" the business as opposed to being "only accessory to it" (*Stevenson Jordan & Harrison Ltd. v. MacDonald et al.* [1952] 1 T.L.R. 101). [For cases in which Canadian Courts have embraced this "organization test" see, for example: *Cooperators Insurance Association v. Kearney* (1965) 48 D.L.R. (2d) 1 (S.C.C.), and, more recently, *Meyer v. J.P. Conrad Lavigne Ltd.* (1980) 27 O.R. (2d) 129 (O.C.A.). In one of a number of "milk store cases" in the mid-1970's the Alberta Court of Appeal concluded that an individual store operator may be an employee within the meaning of the relevant labour legislation even though he fixes his own hours of work, engages and discharges his own employees, is not supervised in the manner of carrying out his duties, and runs the risk of loss. The Court suggested that a useful test is whether the operator of the

store is in effect carrying on the business on his own behalf or on behalf of a superior. See: *R v. Mac's Milk Ltd.* (1973) 40 D.L.R. (3d) 714].

66. Very early on, the U.S. National Labour Relations Board emphasized another factor - statutory context - arguing that the real issue was whether the disputed individuals fell within the ambit of the statute or exhibited the disability which the statute was designed to remedy. That formulation was endorsed by the U.S. Supreme Court in *N.L.R.B. v. Hearst Publications Inc.* (1944) 322 U.S. 111 where the Court said this:

The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors". Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand.

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for presenting them or curing their harmful effects in the special situation....

In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

To eliminate the causes of labour disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service". On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces", and that the very disputes sought to be avoided might involve "employees (who) are at times brought into an economic relationship with employers who are not their employers". In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee", "employer" and "labour dispute", leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

[emphasis added]

67. In practice, the application of these various common law tests and the resulting distinctions between "employees" and "independent contractors" were often artificial and difficult to sustain from a labour relations viewpoint. Individuals could be excluded from collective bargaining merely because the *form* of their relationship might not resemble that of "employer-employee", even though in substance they might be just as controlled by and economically dependent upon the party using their services as any employee. The legal label assigned could foreclose the exercise of the statutory right of self-organization, even where the "mischief" contemplated by the statute was clearly present. In Professor Arthurs' opinion, individuals, in a position of economic dependence, analogous to that of an employees, should be entitled to engage in collective bargaining. He wrote:

Unequal power between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area - employment relations - public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area - commercial competition - collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as "independent contractors" rather than "employees" they lack the legal status which is a prerequisite of the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation. They are prisoners of the regime of competition.

Because the choice of either legal designation - "employee" or "independent contractor" - in effect prejudices the issue of their right to bargain collectively, a new term is needed: "dependent contractor." They are "dependent" economically, although legally "contractors". The ambiguity, the paradox, of their position is thus reflected in the term used to identify them. Self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen, and service station lessees personify the dependent contractor.

Insofar as dependent contractors share a particular labour market with employees, it is submitted, first, that they should be eligible for unionization. Such a result would require a new definition of the term "employee," perhaps along the lines of that adopted in Sweden: "For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person and thereby occupies in relation to that person a position of dependence essentially similar to that occupied by an employee in relation to his employer." Second, courts and labour boards dealing with attempt by organized employees to immunize themselves from the impact of competition from dependent contractors should view this objective realistically.

In 1968, the (Federal) Woods task force on labour relations accepted and reiterated this concern in the following terms:

We are concerned about accessibility to collective action by groups of self-employed persons who are economically dependent for the sale of their product or services on a very limited market or who for other reasons may have economical characteristics of employees. We have in mind such groups as fishermen, owner-drivers of taxis, and independent owner-drivers of trucks and delivery vans.

In 1972, Professor Max Cohen, for the Newfoundland Royal Commission on labour legislation had this to say:

The issue of independent owner drivers, franchised owner drivers performing distribution functions for such industries as dairy products and bakery products, owner drivers of taxicabs, perhaps catering and janitorial services, home workers in the garment industry, etc., was not raised in any of the proceedings or briefs of the Commission. This is at least in part due to the fact that the level of organization in these segments of industry is not great.

Nevertheless, the report must give some consideration to this category of persons *on the grounds that they are in many circumstances analogous to employees in an economic sense although not meeting the definition of employee in the traditional legal sense of the master servant relationship which has been incorporated into the interpretation of labour relations legislation....*

On the merits, those persons at the margin who are denied collective bargaining rights *on the fairly technical grounds of the narrow legal rules of the master servant relation-*

ship would seem to be an appropriate group for inclusion in collective bargaining legislation. These groups are similarly disadvantaged or subject to the disparate power of a single economic interest for whom they ultimately work in return for a fairly fixed payment based either on piece work or time consumed. The issues which these persons would want to discuss with the source of their payment, and, to some extent, direction, are closely analogous to those which employees have to discuss with the more traditional employer.

In addition, where this technique of independent contracts is a circumvention technique to avoid collective bargaining, the purposes of public policy are directly flouted and such practices ought not to be tolerated on the grounds of technical legal distinctions.

At the present time, such groups cannot collect their strength in dealing with the would-be employer without running the risk of infringing the *Combines Investigation Act* - to the extent that they, by virtue of their work affect the trade in commodities. Should services come under the *Combines Investigation Act*, their incapacities in this regard would exist despite the absence of any effect on articles of trade or commerce. In extending rights of collective bargaining to independent or "dependent" contractors, it remains necessary to draw some lines between the dependent category to be granted the protection of collective bargaining and those whose collective action is not held necessary and is seen as an undue impediment to the market forces to which competition policy is directed. Collective bargaining policy represents a deliberate exclusion authorizing market forces to be impeded within certain rules in pursuit of the social interests of distribution of wealth and the capacity of individuals in a dependent relationship to cope with their environment - which environment includes the dominant economic interests with which they must deal. Since the traditional master servant relationship rules do not provide a totally adequate basis for this definition, it is to be recommended that rules that adopt a set of criteria which recognizes the economic realities of dependency be introduced. It is therefore recommended:

Workers in a position of economic dependence analogous to that of the employment relationship should be accorded the right to organize and bargain under labour relations legislation.

68. In 1975, the Ontario Legislature accepted those propositions and enacted what is now section 1(1)(h) of the *Labour Relations Act*. It altered the legal regime to meet the perceived needs of individuals in a particular kind of economic relationship. A number of other provinces and the federal jurisdiction have similar provisions in their collective bargaining statutes; however, the language which the Ontario Legislature used, makes it abundantly clear that individuals *may* be entitled to collective bargaining whether or not they are employed under a contract of employment - that is, whether or not they would be considered to be employees in the traditional common law sense.

69. In *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197, the Board discussed the background and purpose of the then recent amendment, in a long passage to which we might usefully refer:

17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legisla-

tion, but they are also expressly restricted by the federal *Combines investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - colored at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.

20. The problem of drawing a distinction in this area is not a new one for this Board. The case of *Livingston Transportation Ltd.* [1972 OLRB Rep. May 488 provides a good example of the difficulties faced by the outer limits of the Act. The question before the Board was whether certain truck owners were employees or independent contractors. In answering that question, the Board alluded to no less than four approaches that might be taken:

- (1) resort to the control test used for determining the vicarious liability of an employer;
- (2) use of the four-fold test adopted by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd., et al* [1947] 1 D.L.R. 101, a case concerning liability for municipal taxation;
- (3) simply asking the question of whose business is it;
- (4) application of what was referred to as "the statutory purpose test".

The multiplicity of approaches that emerged in the *Livingston* case is some evidence of the problems that then faced the Board when identifying the outer limits of the Act. Fortunately, there is now a new point of departure for distinguishing between the individual worker and the true entrepreneur.

21. The *Labour Relations Act*, having been amended in 1975, now provides a single, and less confusing, approach to the problem. Section 1 of the Act has been amended to provide that the term "employee" includes a "dependent contractor". That same section defines dependent contractor as "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of independent contractor". Section 6 of the Act, moreover, has been amended to provide that "[a] bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit".

22. We do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board's existing jurisprudence, such as *Livingston Transportation*. In those cases, the question had to be framed in terms of whether a person was an employee or an independent contractor. The Board, as a result, placed emphasis on a four-fold test as set out in *Montreal Locomotive Works*.

The appropriateness of this test for determining the outer limits of a collective bargaining statute was always questionable. This concern has been best put by Dean Arthurs in his perceptive article, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965), U.T.L.J. 89. At page 94, he comments:

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material. The pertinent question is whether the factors in employment relationship which invoke vicarious liability bear any relation to those which invite a regime of collective bargaining. The very terminology - "master" and "servant" - evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial dependence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose....

23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for finding that a person is a dependent contractor, since this is a condition that may be experienced by the

true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual relationship, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

In *Adbo*, the Board was elaborating upon the observations of a differently constituted panel of the Board in *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104:

Suffice it to say for our purposes that the Legislature intended by the amendment to address itself to the mischief created by persons who may very well outwardly manifest the trappings of independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-a-vis the beneficiary of his [sic] services that he ought to be extended the protection intended by the collective bargaining process. In this context the Legislature recognized the economic vulnerability of depriving the "so called" small businessmen of rights under the Act and thereby exposing him to the arbitrary whims of the person upon whom he is dependent for his livelihood. Not only is this individual denied benefits commonly accepted in our enlightened society as industrial relations norms (e.g., unemployment insurance, workmen's compensation, statutory holidays, vacation pay, minimum wage and maximum hours, etc.) but is also by operation of *The Combines Investigation Act* susceptible to civil and penal sanctions should he, along with his colleagues, seek by concerted action to redress perceived wrongs in his relationship with his ostensible employer. The watch word of the definition is "dependent" and dependent is to be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service having regard to the industry or undertaking under review. It therefore follows that the status of the "dependent contractor" must be matched and plotted in relation to the terms and conditions of "employees" in like industries to determine whether he, in a *de facto* sense, more resembles them. And, alternatively, it may very well be that, notwithstanding shortcomings in his development as a businessman, he may be without the need or the assistance of collective security. We perceive that the Legislature has instructed the Board in the conduct of such analysis to sacrifice form for substance, to dispel superficial distortion that disguises industrial reality and to supplant individual want by supporting, in appropriate circumstances, collective equality. In short, the Board must deal with the new problem of defining the parameters not only between the employee and entrepreneur but also mid-way between that spectrum of distinguishing and isolating the "dependent contractor" who has statutorily been extended separate and distinct treatment.

70. For collective bargaining purposes the Legislature has abandoned the traditional common law distinction between "employees" and "independent contractors". Rather, the Act now identifies a hybrid creature - the dependent contractor whose rights depend upon the statutory definition, labour relations considerations, and the extent to which s/he is in an economic position roughly equivalent to those for whom this collective bargaining statute has been designed. The legal form of the relationship or the possession of particular assets (for example, the ownership of vehicles - something specifically mentioned in section 1(1)(h)) are no longer determina-

tive of an individual's status for collective bargaining purposes. There is no requirement that s/he receive "wages", as there was in the Alberta legislation under review in: *Re Yellow Cab Ltd. and Board of Industrial Relations et al.* [1980] 2 S.C.R. 761. The test is whether the disputed individual is more like an employee than a self-employed entrepreneur, when viewed from a collective bargaining perspective and the "mischief" which this labour legislation was designed to remedy. It remains, as always, a question of just where to draw the line, because no magic formula can be propounded for determining which factors should, in any particular case, be treated as determinative. The Board must necessarily perform a balancing operation weighing up the factors which point in one direction or the other, and assessing them in light of labour relations policy considerations.

45. In *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057, at paragraph 64, the Board listed eleven factors which, alone or in combination, have been found to be of assistance in some circumstances in determining whether an individual is a dependent contractor:

1. *The use of, or right to use substitutes.* It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.
2. *Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.* These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. *Evidence of entrepreneurial activity.* This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss"; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.
4. *The selling of one's services to the market generally.* If the purchasers of [an] individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.
5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.* Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has "tied his fortunes".
6. *Evidence of some variation in the fees charged for the services rendered.* This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.
7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the*

individual has become an essential element which has been integrated into the operating organization of the employing unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and “place” of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer’s organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist’s material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer’s artistic vision or interests. Even an individual engaged for a short time may be considered “integrated” into the employer’s operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his “non performing” time with unrelated ancillary duties. (See: *Whittaker, supra.*)

8. *The degree of specialization, skill, expertise or creativity involved.* If these are [a] dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of “integration” into the respondent’s organization, the disputed individual is [a] “self-employed” professional.
9. *Control of the manner and means of performing the work - especially if there is active interference with the activity.* However, it is the *right* to interfere rather than the *ability* to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at will and without cause may indicate an employment relationship whether or not the employer exercises this power.
10. *The magnitude of the contract amount, terms, and manner of payment.* If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be “employees”; and independent professionals may charge an hourly rate rather than a block fee).
11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.* The employer’s established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm’s employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee.

See also *Ontario Hydro*, [1986] OLRB Rep. June 790; *Journal La Droit*, [1985] OLRB Rep. Sept. 1372; *The Citizen*, [1985] OLRB Rep. June 819; *Tremways (1982) Limited*, [1983] OLRB Rep. Feb. 289; *Windsor Airline Limousine Services*, [1981] OLRB Rep. Mar. 398; *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679; *Niagara Veteran Taxi*, [1980] OLRB Rep. Mar. 337; *Purple Heart Film Corporation*, [1979] OLRB Rep. Sept. 900; and *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083.

46. It is clear from the evidence adduced in this case that Mr. Kidd is a contractor. What we are called upon to determine in this decision is whether or not he is a dependent contractor within the meaning of section 1(1)(h). As in most situations, some of the factors suggest an element of dependence, while others point towards independence.

47. The first factor referred to in *Algonquin Tavern* is the use of, or right to use substitutes. As indicated above, having decided to increase his income by operating his truck on a double-shift basis, Mr. Kidd unilaterally decided who would drive on the other shift and how much he would be paid for doing so. Moreover, Mr. Kidd was under no obligation to drive the vehicle himself; he was at liberty to fulfill the contract by arranging for someone else to drive his truck if he elected to have it operate only on a single-shift basis, or to arrange for two (or more) other persons to drive it on a double-shift basis. Indeed, that is what he planned to do in the event that the proposed arrangement with the Florida company for flat-bed hauling of lumber had come to fruition. As noted in *Algonquin Tavern*, it has generally been considered inconsistent with an employment relationship if a contractor is at liberty to fulfill the bargain by using someone else's labour rather than his own work and skill.

48. The second factor is ownership of instruments, tools, equipment, appliances, or supply of materials. Mr. Kidd purchased his truck at a cost of \$64,000.00 without any financial assistance from the Company. He received no direction or input from the Company regarding the selection of that vehicle, but rather selected it on the basis of his experience in and knowledge about the hauling industry. To enhance its profitable operation, he utilized a number of assets which he had previously acquired in conjunction with other ventures, including his shop, half-ton truck, welder, and tools. Thus, this second factor is also suggestive of independence in the context of this case. However, as indicated in section 1(1)(h), the fact that a contractor furnishes such assets is not dispositive.

49. The third factor is concerned with evidence of entrepreneurial activity. There is no evidence that Mr. Kidd engaged in self-promotion or advertising in respect of his hauling operations, nor that he used business cards or otherwise solicited customers. However, when he was contacted by the aforementioned Florida company, he did speak with people at the McKenzie mill to see what arrangements could be made, thereby demonstrating an interest in acquiring another truck in order to expand his hauling activities. Moreover, with the assistance of an accountant, he took advantage of tax laws by claiming various deductions which are not available to employees. He also sought to increase his profits by paying for Workers' Compensation at the rate applicable to general trucking rather than the higher rate applicable to log hauling, by electing not to obtain Workers' Compensation coverage for himself, and by making no statutory or other deductions from his payments to his driver, Mr. Lacasse. Thus, this factor does not point unequivocally toward either dependence or independence in the circumstances of this case.

50. The fourth factor listed in *Algonquin Tavern* pertains to the number of purchasers of the contractor's services and the extent to which the contractual relationship or the circumstances limit his ability to serve other purchasers. During the period from December of 1986, when he became a contractor for the Company, to September of 1987, when his contract was terminated, Mr. Kidd hauled almost exclusively for the Company. He also hauled on a limited basis for McKenzie, but those opportunities also came to him through the Company. Although the existence of a consistent relationship of that sort is often highly suggestive of economic dependence, it appears from the totality of the evidence that, contrary to what Mr. Kidd told the Board, a number of other hauling opportunities were available to him. However, he chose not to haul for others during the period in question because he found the Company's rates and road conditions to be satisfactory, appreciated the relatively continuous availability of work, and wished to remain close to his place of residence. Thus, although the fact that Mr. Kidd hauled almost exclusively for the respondent during the material period of time lends weight to the complainant's contention that Mr. Kidd was economically dependent upon the respondent, the fact that this was a matter of choice rather than a matter of necessity dictated by the circumstances of the industry or the terms

of his contractual relationship with the respondent substantially reduces the determinative value of that fact in the instant case.

51. The fifth factor pertains to economic mobility or independence, including the contractor's freedom to reject job opportunities, or work where and when he wishes. As indicated above, although he did not avail himself of the opportunity, we are satisfied on the totality of the evidence that Mr. Kidd was free to refuse a load and to wait for another load on the basis of his personal preference concerning the type of wood to be carried or the mill to which he wished to haul. He was also at liberty to haul for other firms whenever he so desired without notice to the Company or risk of any sanction. In view of the chronic shortage of hauling contractors in northwestern Ontario and the numerous firms which compete with the respondent for the services of such contractors, this was clearly a viable option for Mr. Kidd, notwithstanding the fact that, as a matter of personal preference, he chose not to exercise it. Thus, this factor is also suggestive of independence in the circumstances of this case.

52. Under the sixth factor the Board considers whether there is evidence of some variation in the fees charged for the services rendered. As might be expected in a competitive situation in which contractors frequently communicate with one another at truck stops and by means of "C.B." radios, the rates paid by the Company do not vary from contractor to contractor, although they do vary from route to route, depending upon such factors as distance and hauling conditions. As noted above, there is a rate set by the Company for each route, following negotiations with representatives of the contractors hauling on the route. If the Company and the contractors are unable to arrive at a mutually satisfactory rate for a route, contractors are under no obligation to and generally do not continue to haul on that route. In such circumstances, if the Company wishes to move that wood it either has to raise the rate or find an alternative means of hauling it, such as shipping it by rail or using Company trucks and drivers. On the whole, we do not find the evidence concerning rates to be of much assistance in deciding the issue that is before us.

53. The seventh factor calls for consideration of whether a contractor has become an essential element which has been integrated into the operating organization of the Company. Here the evidence does indicate some integration of contractors into the Company's operations. With the exception of relatively isolated instances in which Company trucks are dispatched to cover hauls for which a mutually acceptable rate has not been arrived at between the Company and the contractors, virtually all of the Company's hauling in the Sioux Lookout area is done by contractors such as Mr. Kidd. Where Company drivers and contractors are hauling on the same route, all of the trucks are generally listed on the same schedule. However, Company drivers are strictly required to adhere to that schedule (unless otherwise directed by Mr. Salmi or their dispatcher), whereas contractors are not obliged to do so. Nevertheless, contractors generally do follow the schedule, at least for their first haul of the week, in recognition of the fact that schedules for contractors were introduced by the Company at the contractors' request to reduce waiting time at the loader. Contractors have the option of obtaining life insurance under the Company's group plan. However, unlike Company employees, their participation in the plan is not mandatory. Moreover, unlike Company trucks, contractors' trucks do not bear the Company name or logo. This reflects the fact that each contractor is at liberty to haul for other firms and, as noted above, is under no obligation to devote all or any specified amount of his hauling time to the service of the Company. Thus, although the seventh factor does provide some support for the complainant's position, it does not point unequivocally toward dependence.

54. The eighth factor is the degree of specialization, skill, expertise, or creativity involved. This factor is not very helpful in the instant case, except to the extent that the various steps which the Company takes to ensure that Company drivers possess and properly exercise the driving skill

and expertise necessary to haul safely and efficiently stand in sharp contrast to the lack of control exercised by the Company in that regard in respect of contractors and their drivers. As indicated below, the substantial difference which exists between the manner in which the Company deals with Company drivers and the manner in which it deals with contractors is of assistance in deciding the issue of Mr. Kidd's status.

55. The ninth factor involves consideration of the extent to which the respondent controls the manner and means of performing the work. In contrast with the extensive control which the respondent exercises over Company drivers through Company rules, tachometer card monitoring, driver's licence abstracts, and disciplinary action, the Company exercises almost no control at all over the manner and means by which Mr. Kidd and other contractors perform their work. As indicated above, contractors select, purchase, and finance their own trucks without any input or assistance from the Company. Contractors such as Mr. Kidd are not bound by any of the Company rules which apply to Company drivers. The Company's disciplinary procedures apply only to Company drivers and have no application to contractors and their drivers. The loading schedule which was instituted by the Company at the request of the contractors in order to eliminate unnecessary waiting time at the loading sites has already been discussed and found to be of little assistance in determining the status of the contractors as they are not obliged to adhere to it. The Company does not control the amount of wood hauled by contractors, nor the manner in which they drive their trucks. Contractors are under no obligation to report accidents to the Company, and the Company does not investigate contractors' accidents. The Company's deduction of \$200.00 from the cheque of a contractor whose vehicle hits the Sioux Lookout railway underpass and spills its load covers the average cost of cleaning up such spills. Moreover, it was not devised by the Company, but rather is a procedure formulated by the Sioux Lookout safety committee and implemented by the Company in order to assist the committee in dissuading contractors from creating a safety hazard by overloading their trucks. Thus, the preponderance of the evidence pertinent to the control factor is clearly indicative of independence rather than dependence.

56. The tenth factor, which is the magnitude of the contract amount, terms, and payment, also points toward independence rather than dependence. Unlike Company drivers who are paid on a per trip basis and have an hourly rate for waiting time and time spent changing tires, washing Company trucks, helping mechanics repair Company trucks, or cleaning up the Company yard, contractors are paid solely on the basis of the volume of wood which they haul. No statutory deductions are made by the Company in respect of contractors, although deductions are made for fuel obtained from the Company, and for life insurance coverage if the contractor opts for such coverage. As previously indicated a contractor can gross as much as \$200,000.00 a year. How much of that remains with him as profit depends upon a number of variables, including the costs incurred in operating and maintaining his truck, the amount paid to others for driving it, insurance costs, and financing charges. While some of those costs are beyond his control, others may vary substantially depending upon decisions which the contractor makes concerning such things as the age and condition of the truck which he chooses to purchase, the driving skills of the driver(s) he selects, and the amount and type of insurance coverage which he obtains.

57. Under the final factor in the *Algonquin Tavern* decision, the Board considers whether the contractor renders services or works under conditions which are similar to persons who are clearly employees. As indicated above, the Company drivers are unquestionably employees. While on a general level it can be said that Company drivers and contractors render the same service by hauling wood from various load sites to various mills, a closer examination clearly indicates that there are substantial differences in the relationship between the respondent and Company drivers on the one hand, and the respondent and contractors such as Mr. Kidd on the other. A number of significant differences regarding their selection, control, and remuneration have already been

detailed in this decision and need not be repeated. It is sufficient to note at this juncture that the various procedures described above by which the Company tests, hires, regulates, and disciplines Company drivers have no counterpart in the context of the conditions under which contractors provide hauling services to the Company.

58. In summary, although some of the aforementioned factors (such as factors 3, 4, and 7) are somewhat equivocal or (as in the case of factors 6 and 8) are of little assistance in the context of the instant case, several major factors point towards independence rather than dependence. Mr. Kidd was at liberty to fulfill his hauling contract with the Company by having whomever he wished drive his truck, and was under no obligation to drive it himself. He was also free to accept or reject any load offered by the Company, to operate on a single or double-shift basis, and to haul for other firms whenever he wished to do so. The Company had almost no control at all over the manner or means by which Mr. Kidd provided hauling services. Moreover, there is a dramatic contrast between the highly controlled relationship which existed between the respondent and its Company drivers, and the very loose relationship which existed between the respondent and contractors such as Mr. Kidd. Thus, having carefully considered the totality of the evidence and the submissions of the parties, we are of the opinion that although Mr. Kidd performed work or services for the respondent for compensation, he was not in a position of economic dependence upon, and under an obligation to perform duties for, the respondent more closely resembling the relationship of an employee than that of an independent contractor.

59. In reaching that conclusion, we have not overlooked Mr. Kidd's evidence that in their dealings with him, some members of management occasionally used terminology that is more often used in the context of an employment relationship than in the context of the relationship between a purchaser and an independent contractor. For example, Mr. Kidd testified that on July 20, 1987, Mr. Miller told him that Mr. Halstead had telephoned that morning and told him that Mr. Kidd was to be "fired". It was also his evidence that later that same day he had another conversation with Mr. Miller during which the latter advised him to phone Mr. Halstead, "talk real nice to him", and may be he would "get [his] job back". (Mr. Miller subsequently telephoned Mr. Kidd and asked him to resume hauling for the Company.) Mr. Kidd gave that evidence on March 28, 1988, more than eight months after those conversations. Since Mr. Kidd did not impress us as being a person who possesses an exceptional memory (and did not suggest that he had made any contemporaneous notes of those conversations), it is questionable whether he was in a position to recall precisely what was said on that occasion. However, even if it is assumed that Mr. Kidd's recollection of those conversations is entirely accurate, the use of terms such as "job" and "fire" is no more determinative of the issue before us than is the description of Mr. Kidd as a self-employed equipment operator in his income tax returns. Moreover, the issue is not whether management thought that Mr. Kidd was an employee (and the preponderance of the evidence indicates that they did not), but whether on the Board's interpretation of section 1(1)(h) of the *Labour Relations Act*, he was in actuality a dependent contractor (and, therefore, as a matter of law, an employee for purposes of the Act).

60. We also find it appropriate to briefly mention two other matters raised by Mr. Dubinsky during argument. It was his contention that the respondent had the burden of proving that Mr. Kidd was an independent contractor as it was the respondent that was attempting to exclude him from the benefits of the Act. Under the circumstances, we find it unnecessary to deal with that argument. The matter of which party has the burden of proof is generally only relevant where there is no evidence before the Board or where the evidence before the Board is equally balanced. Neither of those situations obtains in the instant case. As indicated above, we are satisfied on the totality of the evidence that Mr. Kidd was not a dependent contractor within the meaning of section 1(1)(h) of the Act.

61. Mr. Dubinsky also submitted that the respondent's failure to call Mr. Miller as a witness should prompt the Board to draw an inference that Mr. Miller's testimony would have been evidence against the respondent's interest. In appropriate circumstances, a party's failure to call a particular person as a witness may warrant the drawing of an inference that the person's evidence would have been unfavourable to that party's case or at least would not have supported it. See, generally, *Anderson Metal Industries Inc.*, [1981] OLRB Rep. Apr. 415, and *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645. However, as contended by respondent's counsel, no such inference can legitimately be drawn in the circumstances of the present case. Many of the sweeping statements made by Mr. Kidd during his examination-in-chief which might have called for an explanation from Mr. Miller were contradicted or significantly qualified in cross-examination. Moreover, as noted earlier in this decision, those instances, together with the evasiveness and forgetfulness displayed by Mr. Kidd in some parts of his testimony, have led us to conclude that we should not rely upon Mr. Kidd's evidence where it was inconsistent with other evidence concerning the relationship between contractors and the Company. Finally, we are satisfied that the detailed information which Messrs. Halstead, Perrier, and Salmi were able to provide in their evidence concerning the Company, including its operations in Sioux Lookout, obviated any need to call Mr. Miller and thereby further extend these protracted proceedings.

62. For the foregoing reasons, this complaint is hereby dismissed.

DECISION OF BOARD MEMBER JANIS SARRA; June 6, 1989

1. With the greatest respect to my colleagues, I have concern that the majority has made findings of fact beyond the scope of the issue before the panel and that these are inappropriate in the circumstances. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant union alleges Mr. Kidd has been fired contrary to sections 66 and 70 of the *Act*. The preliminary issue was whether or not Mr. Kidd was a dependent contractor. The number of hearing days was less a function of the magnitude of the issue than of the factors outlined in paragraph 3 of the majority decision. This was the case of one individual, hauling for the respondent in the Sioux Lookout area, who alleged the respondent took actions against him contrary to the *Act* and that as a dependent contractor defined by section 1(1)(h) he was entitled to the protections afforded by the *Act*. There was considerable evidence led on this issue and in large measure I agree with the findings of the majority as they relate to Mr. Kidd.

2. This case was however, unusual in two respects. It was a first look at hauling in the raw forest products industry in the context of a challenge to the status of tractor-trailer drivers. Thus there was no existing case law on point. Secondly and perhaps more important, unlike all the case law relied upon by the majority, this was not a case where the status of a group of individuals was being considered and where the industry precedent was being set based upon a thorough canvassing of those employment relations. Rather it arose in the context of the status of one individual. It was not a consideration of the industry as a whole nor was it a consideration of the entire operation of the respondent. There was no agreement that Mr. Kidd was representative of the contractors. There was no representative group of truckers who gave evidence. In fact, there was no evidence from any trucker, either "company driver" or "contractor" other than Mr. Kidd. In these circumstances it is inappropriate for the Board to have made findings about the employees or contractors, beyond the issue of Mr. Kidd's status.

3. Although it is the parties who shape any case through the evidence they lead, it is invariably the panel that scopes the case and defines its parameters. This panel attempted to do just that and there were innumerable rulings during the 24 days of hearing, both procedural and evidentiary (all unanimous) which answered the question: "what is the relevance or arguable relevance to the

specific issue of whether or not Mr. Kidd was a dependent contractor?”. Such rulings by necessity precluded information about parts of the respondent’s operation and its corporate and economic relationship to the Buchanan group of companies. Having scoped the hearing in such a manner, it is now inappropriate for the Board to make findings on the operation and employment relations of the respondent on such a broad scale.

4. The term “dependent contractor” was coined to recognize those individuals whose employment, although involving some degree of independence, when viewed in the totality of economic activity and in a labour relations context, involved a degree of economic dependence resembling more that of employee than self employed entrepreneur. The majority decision has concisely summarized and characterized the development of the Board’s case law and the legal tests which have evolved and it is not necessary to repeat them. The case law reflects the view that those working in an economic position more analogous to an employee should be afforded the protections of the *Labour Relations Act* and enjoy the benefits of collective bargaining. In approaching that question it is useful to bear in mind the comments of the U.S. Supreme Court in *N.L.R.B. v. Hearst Publications Inc.* (1944) 322 U.S. 111:

“...it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for presenting them or curing their harmful effects in the special situation...”

In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.”

5. As the Board said in *Airline Limousine*, [1988] OLRB Rep. March 225, the reason for inclusion of dependent contractors in the *Act* was to cure an inherent weakness in the definition of employee. It recognized that the right of self organization by individuals in a position of economic dependence is a right conferred by the law as a method of redressing the imbalance of power through engaging in collective bargaining. The tests which have been developed are a means by which the Board can assess whether individuals fall within the ambit of the *Act* and its purpose which is to foster harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining. Bearing this in mind, the Board should be adopting an incremental decision-making approach when taking a first look at any sector of economic and employment activity. In this case, the Board should not be deciding a question beyond the scope of Mr. Kidd’s status.

6. I give a few examples as illustration of the inherent danger in deciding the employment “facts” for individuals not at issue. In terms of the “organization test”, whether the individual is an essential element integrated into the respondent’s operation, Mr. Kidd may well be “in business” for himself; however the evidence was that Atway uses contractors exclusively to perform the work of its ongoing contractual commitments with Buchanan Forest Products Ltd. to haul in the Sioux Lookout area (except the one time company drivers were sent in). The evidence suggested that despite the movement of individuals, there was some stability of the employment relationship in that the contractors work full-time on an ongoing or returning basis, and that these contractors are an integral part of the operation of the business. Similarly, there was some evidence to suggest that the running of single or double shifts is less an independent business decision to maximize profit than one of economic necessity to offset the decrease in income during the half-load season. The comparison of the employment relations of the company with its own drivers certainly assists, however the fact that there are no company drivers in the Sioux Lookout area somewhat limits the pro-

bative value of this. The Board did not have the benefit of any evidence of the respondent's other contractors who are hauling in a number of regions to 22 different mills.

7. A second example is in terms of evidence of entrepreneurial activity. The Board has used tests such as self-promotion, advertising, soliciting to develop clients, the use of agents and organizing one's "business" to take advantage of limited liability or tax laws. Again, in the specific case of Mr. Kidd, the panel had evidence that he attempted to arrange some entrepreneurial activity in Florida; sought to organize himself for tax reasons and to by-pass his liability with respect to the Workers' Compensation Board. The panel received absolutely no evidence with respect to other contractors, whether there was any indication that they engaged in any activities indicative of entrepreneurial activity; what their tax arrangements were; nor was there any evidence that these contractors sought to by-pass the requirements of the Workers' Compensation Act. If as the respondent alleges, these contractors are independent, then the Board should be cautious in making a finding of fact based upon the company's evidence alone in this regard.

8. The evidence is less than clear that Mr. Kidd's situation can be extrapolated company wide. For example, the majority found that in 1985, the respondent undertook some financial arrangements for six (about one quarter of the total) contractors, with Atway making deductions for remittance to another company in respect of a rental/purchase agreement for tractor-trailers. Similarly, whether it is the scheduling of haul pick-ups without consultation or negotiation; the requirements by the Workers' Compensation Board to cover single shift operators as employees; the arbitrary hold back of monies for spill clean ups, fuel keys, road fines and workers' compensation; the assignment of hauling on occasion for other companies without consultation or negotiation; the provision of hotel or trailer accommodation for contractors working out-of-town; the deduction of union dues for a number of contractors although not Kidd; the change of companies from Agassiz to Atway without consultation or negotiation of a contract or terms of reference; the setting of haul rates without contractual negotiations with each contractor and no evidence as to whether the one or two that are negotiated with are single owners or multiple truck owners; none of these factors are conclusive, but what is clear is that the evidence even as found by the majority points in a number of directions. Without the benefit of any evidence of any contractors in any other part of the respondent's extensive operation, it is not appropriate to make findings beyond the issue of Mr. Kidd's status.

9. For each of the eleven factors or tests developed by the Board there are findings of fact on Mr. Kidd's situation with which I concur. However, for each test there are also compelling indicators that point in the opposite direction. This panel did not have before it the issue of the status of all contractors of the company. The parties did not suggest that Mr. Kidd was representative of other contractors. If that had been the issue the parties may well have led more evidence. Although some evidence was led on the contractors as related to Mr. Kidd's status, there is no reason to assume the panel heard all the relevant evidence. The panel did not have the evidence in a balanced and thoroughly canvassed manner that would enable it to make findings for all the contractors. Yet the majority wrote in paragraph 19 "Having regard to the totality of the evidence, we are satisfied that the relationship between the contractors and the Company is substantially similar throughout the Company's operations in northwestern Ontario". That finding is based upon the majority preferring the company's evidence because of what the majority characterizes as the evasiveness and forgetfulness of Mr. Kidd's evidence. That forgetfulness may well go to preferring the evidence of the company in the determination of Mr. Kidd's status, but it appears to provide no basis whatsoever for a finding on all the respondent's contractors.

10. The 1975 amendments to the *Labour Relations Act* adding dependent contractor were aimed at curing a perceived weakness of the statute that individuals who, because of their eco-

nomic position on the continuum of labour between employee and independent contractor, should have access the rights and protections of the *Labour Relations Act*. In this case, the question was "is the employment relationship of Mr. Kidd that of a dependent contractor?" In answering that question, can the Board go any further in its analysis or is the finding with respect to all the company's contractors inappropriate? With the greatest respect to my colleagues, the many pages in their decision devoted to the historical analysis of the dependent contractor concept speaks to a liberal and expansive construction to be given in approaching the question in any given case. Yet this analysis is not applied here where the majority decision may foreclose any future effort by a group of these contractors who may seek status to enjoy the benefits and protections afforded by the *Act*. For these reasons, I concur only with the specific issue before this panel, that on balance the evidence does not establish Mr. Kidd was a dependent contractor during the period in question.

**0474-88-U Local 865, International Union of Operating Engineers, Complainant
v. Canadian Pacific Forest Products Limited, Respondent**

Duty to Bargain in Good Faith - Unfair Labour Practice - Respondent failing to disclose its intention to shut down one of its steam turbine generators operated by bargaining unit employees - Four positions eliminated and 21 employees realigned - *De facto* decision to shut down generator made prior to or in course of collective bargaining between parties - Breach of bargaining duty - Question of remedy remitted to parties

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members M. Rozenberg and H. Kobryn.

APPEARANCES: W. Dubinsky, Donald Knibbs and Leo Roy for the complainant; Fred Bickford, Ted Gibbons, Frank Wirtz and Garnet Valiquette for the respondent.

DECISION OF THE BOARD; June 13, 1989

1. At all times material to the allegations made in this complaint the proper name of the respondent was Great Lakes Forest Products Limited. That changed subsequently, however, and, accordingly, the name of the respondent was amended (at the first day of hearing) to "Canadian Pacific Forest Products Limited".

2. The complainant alleges that the respondent breached section 15 of the *Labour Relations Act* when, in the course of the negotiations which led to the collective agreement presently in effect between the parties, it failed to disclose its intention to shut down one of the steam turbine generators which was operated and maintained by employees in the bargaining unit represented by the complainant. The complainant alleges that, as a result of the respondent's breach, it and bargaining unit employees it represents have suffered damages. The complainant seeks:

- (a) an order directing the respondent to not implement its plan to take turbine #1 out of service;
- (b) an order directing the respondent to meet with the complainant to reasonably and fairly discuss the changes to the collective agreement that should have been discussed during the period of negotiations to consider the implementation of its plan to take turbine #1 out of service;

- (c) an order directing the respondent to pay damages to the complainant on behalf of the employees in the bargaining unit resulting from the loss of the opportunity to negotiate and conclude a proper collective agreement;
- (d) an order directing the respondent to pay damages to the complainant for all the negotiating, and other expenses incurred as a result and misrepresentation and bad faith bargaining; and
- (e) an order directing the respondent to cease its intention to eliminate the turbine operators.

[sic]

3. As a preliminary matter, the respondent submitted that the Board should defer its consideration of the complaint pending the arbitration of a grievance filed by the complainant with respect to the shut down of turbine #1. The respondent argued that the dispute between the parties is purely contractual and is therefore properly dealt with at arbitration. It also pointed to what it asserted was the complainant's delay in bringing the matter before the Board and suggested that the complaint is, at best, a trivial one. The Board orally dismissed the respondent's motion as follows:

The respondent moves that the Board defer consideration of this complaint to the grievance and arbitration procedure established by the collective agreement in effect between the parties. There has been a grievance filed with respect to the shut down of turbine #1, which shut down prompted the filing of this complaint.

As Mr. Bickford rightly conceded, for the purpose of this motion, and only for that purpose, the Board must take as being true the allegations made in the complaint. In essence, this complaint raises issues of the kind raised and dealt with by the Board in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; application for judicial review dismissed 80 CLLC ¶14,062 (Ont. Div. Ct.) and *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411, [1983] OLRB Rep. December 1995 (reconsideration), [1984] OLRB Rep. March 422 (remedy) (see also *C & P Ltd.*, [1982] OLRB Rep. May 726), although, on its face, the complaint differs from those cases in degree.

We accept as correct the summary of the Board's practice with respect to deferring to arbitration which is set out in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 and *The General Hospital of Port Arthur*, [1986] OLRB Rep. August 1218 (among others). Although there does seem to be a contractual dispute between the parties, it does not seem likely that the resolution of that contractual dispute will resolve the alleged unfair labour practice aspect of the dispute between them. While there may well be an overlap on the factual basis for the grievance and this complaint and in the remedies requested in each, we are not satisfied that they are congruent. We are not satisfied that the dispute is entirely contractual in the sense that a board of arbitration, having regard to its limited jurisdiction, could not deal with it in its entirety. Further, we are aware of the long time it now often takes for grievances to be arbitrated and of the maximum that labour relations delayed are labour relations defeated and denied (see *Journal Publishings Seal of Ottawa*

Ltd., et. al. v. Ottawa Newspaper Guild, Local 205, OLRB et. al, March 31, 1977, Ontario Court of Appeal, unreported).

Finally, any element of *de minimis [non curat lex]* or delay can be taken into account in the disposition of the complaint.

In the result, we are not satisfied that, in the circumstances, it is appropriate for the Board to defer its consideration of this complaint and the Board will hear it.

4. The respondent is a large producer of forest and paper products. This complaint concerns a plant it operates in Thunder Bay. The complainant represents approximately 122 employees of the respondent who are engaged in the operation and maintenance of the steam plant, recovery plant, oil plant, and various equipment in Thunder Bay as specified in a collective agreement between the parties. In total, there are between 2,800 and 3,000 employees in the plant.

5. Turbine #1 is the turbine in question. It is located in the steam plant. At the material times, it was approximately sixty years old and had a relatively low power production capacity. Another turbine in the steam plant, (turbine #2) of similar vintage, but which was somewhat different from turbine #1, was shut down in 1983.

6. The previous collective agreement between the parties expired on April 30, 1987. By letter dated March 17, 1987, the complainant gave the respondent notice of its desire to bargain a new collective agreement. The first meeting between the parties in that regard took place on May 19, 1987 at which time the parties exchanged the proposals. The next meetings between the parties took place on July 20 and 21, 1987. During the course thereof, on July 21, 1987, the complainant asked, as part of its proposals for the new collective agreement, that a motorized crane be installed in the turbine room in the steam plant to assist in the maintenance and repair of turbines number 1 and 3. In the course of that part of the complainant's presentation, Garnet Valiquette, a member of the respondent's negotiating team, commented that once the turbines were gone there would be no need for a motorized crane. Prompted by that comment, Donald Knibbs, Chairman of the complainant's negotiating committee, observed that there had been rumours in the plant of possible turbine shut downs and asked whether there was any truth to these rumours. Speaking for the respondent, Frank Wirtz, Chair of its bargaining committee, replied that he did not know what Knibbs was talking about and that there was no truth to the rumours.

7. Subsequently, on October 8, 1987, the two negotiating committees reached an agreement and signed a memorandum of settlement (on October 9, 1987) for a new collective agreement, subject to ratification. On October 12, 1987, the bargaining unit employees ratified the memorandum by one vote.

8. The new collective agreement was implemented immediately, although there was some delay in the formal execution of the collective agreement while a formal document was prepared for signing. A signing meeting was scheduled for February 23, 1988 but the document was not yet ready for signature. However, the respondent did advise the complainant that it was "considering" shutting down a turbine and that the company hoped that the union would co-operate with it in that regard.

9. A further meeting was held on March 25, 1988 at which time all but one of the persons who it was intended would sign the collective agreement did so. (That individual was to sign later and nothing turns on this.) The respondent then announced that effective June 1, 1988, turbine #1 would be taken out of service and that this would result in the elimination of the those turbine

operator positions associated with it. The complainant was not happy. It immediately sought advice and submitted a grievance with respect to the matter. At a subsequent meeting with respect to the grievance, on May 4, 1988, Valiquette, who was present on behalf of the respondent, made comments which suggested that the shut down of turbine #1 had been planned for some time. The complainant immediately raised the issue of the respondent's failure to make that disclosure during the collective bargaining which had led to the collective agreement which had just been executed and, on May 20, 1988, it filed this complaint.

10. Although there were no actual layoffs as a result of the shut down of turbine #1, four turbine operators have in fact been displaced. Pursuant to the terms of the collective agreement between the parties, these four were entitled to "bump" into other, lower paying, bargaining unit positions. As many as 21 bargaining unit employees were eventually affected by this bumping process.

11. The documentary evidence before the Board, most of which came from the files of the respondent, establishes that the problems with turbine #1 which eventually resulted in a shut down first became apparent in the course of an inspection in early November 1985. Almost immediately thereafter, a review process, was culminated in the shut down, was begun. The evidence suggests that shutting down turbine #1 was explored in early 1986 as a alternative to the extensive overhaul that would otherwise have been required. By July and August 1986, it had been specifically identified and costed as an alternative. The overhaul alternative was specifically rejected in the budget discussions which occurred in late 1986. In addition, as early as February 25, 1987 correspondence to and from a consulting firm retained with respect to the future of turbine #1 refer to it being "eliminated" There is also correspondence with respect to the respondent's insurance coverage in May 1987 which unequivocally states that the respondent planned to shut down turbine #1 by late 1988.

12. Although the respondent presented no evidence with respect to when any formal decision to shut down turbine #1 was made, it is quite clear that that decision had, for all practical purposes, been made well before the July, 1987 collective bargaining sessions between the parties.

13. Section 15 of the *Labour Relations Act* imposes an obligation on the parties to "bargain in good faith and make every reasonable effort to make a collective agreement". Its purpose is to reinforce the employer's obligation to recognize and deal with the trade union as the exclusive bargaining agent of the employees in the bargaining unit it represents, and to reduce the potential for industrial conflict by encouraging rational, informed discussion of the real collective bargaining issues between the parties.

14. Where a breach of section 15 is alleged, the Board is primarily concerned with the process of collective bargaining. The content of such bargaining is generally relevant only to the extent that it intends to reveal the process. The duty to bargain in good faith, though central to the collective bargaining process, is also a delicate one. In dealing with it, the Board must be sensitive to the legitimate concerns of both the employer and the trade union. Consequently, the Board approaches in any invitation to intervene in the collective bargaining process with caution and restraint.

15. In the result, the Board has concluded that the duty imposed by section 15 creates a disclosure obligation, but the Board has not engaged in any single minded pursuit of disclosure. Consequently, what disclosure, if any, that is appropriate will depend on the circumstances. As a general matter, however, an employer is obliged to disclose to a trade union information which is necessary for the latter to reach informed decisions and perform its statutory duties (see, for example, *Devilbiss (Canada) Limited*, [1976] OLRB Rep. March 49; *Inglis Limited*, [1977] OLRB Rep.

March 128; *Radio Shack (Canada) Limited*, [1979] OLRB Rep. Dec. 1220; judicial review dismissed in *Re Tangy Electronics Ltd.*, and *United Steelworkers of America et. al.* (1980) 30 O.R. 2d 29 (Div. Ct.), leave to appeal to court of appeal denied March 10, 1980; *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; application for judicial review dismissed 80 CLLC ¶14,062 (Ont. Div. Ct.); *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 (1983) OLRB Rep. December 1995 application for reconsideration dismissed, [1984] OLRB Rep. March 422 (remedy); *Forintek Canada Corp.* [1986] OLRB Rep. Apr. 453). This includes any decision made by the employer to the extent that the decision has an impact on the bargaining unit employees or their trade union (*Westinghouse Canada Limited*, *supra*; *Consolidated Bathurst Packaging Ltd.*, *supra*).

16. As indicated above, we are satisfied that the respondent had made a *de facto* decision to shut down turbine #1 prior to or in the course of the collective bargaining between the parties. Moreover, we are satisfied that the complainant specifically asked the respondent whether it intended to shut down any of the turbines and that the respondent failed to reply honestly to that question. Even if the question asked by the complainant was with respect to turbines, as opposed to any single turbine, and assuming that any one really made a literal distinction of that kind at the time, the respondent's response was, in the circumstances, misleading and disingenuous. Even if the chair of the respondent's negotiating committee knew nothing of the intended shut down of turbine #1, it is evident that at least one other member of the committee (Mr. Valiquette) did. In any event, as the Board pointed out in *Consolidated Bathurst Packaging Ltd.*, *supra*, the respondent was under a duty to send informed representatives to the bargaining table and was under an obligation to disclose its decision whether or not it was asked about it by the complainant. Further, the respondent's misrepresentation, whether innocent or not, could have and should have been corrected prior to the bargaining between the parties in October 1987.

17. The Board is also satisfied that the respondent knew, as evidenced by its conduct when it reveal its decision to the trade union in February and March 1988, that the decision would have an impact on the bargaining unit. As indicated above, that impact consisted of the elimination of four bargaining unit positions and the bumping that resulted therefrom. Although no bargaining unit employee was discharged or laid off because of the decision (a fortuitous result in our view), it appears that approximately 21 bargaining unit employees were affected by the realignment of employees within the bargaining unit as a result of the decision.

18. The respondent sought to rely upon the Board's decision in *B.C.L. Canada Inc.*, [1984] OLRB Rep. June 791. In that case the Board found that the reasoning in *Westinghouse Canada Limited*, *supra* and *Consolidated Bathurst Packaging Ltd.*, *supra*, did not apply because no *de facto* decision affecting the bargaining unit or the trade union had been made prior to or in the course of negotiations for a new collective agreement. The respondent also relied upon *Amoco Fabrics Ltd.*, [1982] OLRB Rep. March 314 where the Board found that the employer had been under no obligation to disclose a business decision which it honestly believed would not have an impact on the bargaining unit. Unlike those two cases, however, the respondent in this case did make a *de facto* decision to shut down turbine #1 and it knew, or ought to have known, that this decision would have an impact on the bargaining unit and on the complainant. Indeed, the evidence suggests that the respondent purposely tried to keep its decision to shut down turbine #1 from the complainant until a new collective agreement had been reached.

19. In the result, the Board finds that the respondent breached section 15 of the *Labour Relations Act* in that it failed to bargain in good faith when, in the course of collective bargaining between the parties, it failed to disclose the complainant its intention to shut down turbine #1.

20. The Board is also satisfied that as a result of the respondent's breach of the Act, the complainant lost the opportunity to bargain with respect to the effects of the respondent's decision. We are not persuaded that the complainant knew or ought to have known that turbine #1 would be shut down, particularly when it was specifically advised by the respondent that there was no truth to the rumours that it might. In our view, the complainant's withdrawal from the bargaining table of proposals relating to the installation of equipment to assist in the repair and maintenance of the turbines was no more than a part of the normal kind of compromise that generally occurs at the bargaining table and indicates no more than that the complainant had some other greater collective bargaining priorities.

21. It is also evident that a number of bargaining unit employees suffered losses as a result of the shut down of turbine #1, which losses may have been eliminated or mitigated had the complainant had an opportunity to bargain with respect thereto. While any losses suffered by the complainant or the bargaining unit employees in this case are undoubtedly not of the same magnitude as those in *Consolidated Bathurst Packaging Ltd.*, *supra*, we are not satisfied that the maxim *de minimis non curat lex* is one which is properly applied at this stage of the proceeding.

22. In argument, the complainant suggested that one remedial alternative available to the Board in this case is to direct the parties to meet and attempt to work out the remedy themselves. Having regard to the Board's observations in *Consolidated Bathurst Packaging Ltd.*, *supra*, with respect to the appropriate remedy in such cases, the difficulties associated with assessing damages as part of any such remedy, and because it is always preferable from a labour relations point of view for parties to resolve such matters between them if they can, we find it appropriate to remit the question of remedy to the parties. To assist the parties in that respect, we note that the Board would not find it appropriate to direct the respondent to put turbine #1 back into operation. The Board will also make a Labour Relations Officer available to the parties if they wished the assistance of one in their discussions with respect to remedy.

23. Because the parties may be unable to resolve the issue of remedy between themselves, the Board will remain seized with respect to that issue. In that regard, the Registrar is directed to schedule this matter for hearing before this panel on the request of either party for the purpose of hearing the evidence and representations of the parties with respect to the appropriate remedy including the quantum of damages suffered by the complainant or the bargaining unit employees, if any, as a result of the respondent's breach herein.

0276-89-R Association des enseignantes et des enseignants suppléants d'Ottawa-Carleton élémentaire séparée, Applicant v. **Conseil scolaire de langue française d'Ottawa-Carleton** (section catholique), Respondent

Certification - Pre-Hearing Vote - School Boards and Teachers Collective Negotiations Act - *Ottawa-Carleton French-Language School Board Act, 1988* setting up a distinct school board for French-language education in the Ottawa area - Applicant applying to be certified for occasional teachers and part-time supply instructors employed by the respondent - Respondent arguing that it is not the employer - Board examining scheme of Act - Pre-hearing vote ordered - Outstanding issues to be addressed at hearing following vote

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *M. Rozenberg* and *H. Peacock*.

DECISION OF THE BOARD; June 15, 1989, as amended July 10, 1989

1. This is an application for certification in which the applicant has requested a pre-hearing representation vote.
2. In accordance with its usual practice in pre-hearing vote applications, the Board directed the appointment of a Labour Relations Officer to meet with the parties for the purposes of examining their records to obtain the information necessary to the Board's determination of whether to direct a vote, of obtaining the parties' positions on the description and composition of an appropriate bargaining unit and the voting constituency, of conferring with the parties with respect to vote arrangements and of recording the parties' positions with their reasons for those positions on all matters in dispute and any other matter arising out of the application. That meeting took place on May 17, 1989.
3. Under Part XI of the *Education Act*, R.S.O. 1980, c. 129 as am., the Legislature provided for education in the French language under the auspices of English-language school boards. This Board has, on several occasions, considered whether the occasional teachers teaching in schools or classes established under Part XI ("Part XI teachers") should be included in a unit composed of other occasional teachers: see, for example, *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090, in which l'Association des Enseignantes et Enseignants Suppléants was certified to represent occasional teachers in secondary schools where French is the language of instruction, that is, for Part XI teachers teaching in Part XI schools run by the Ottawa Board of Education in the City of Ottawa; *Ottawa Board of Education* (File No. 2845-87-R, October 11, 1988), in which the parties agreed to exclude Part XI secondary school occasional teachers; and *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18, in which Part XI occasional teachers were excluded from the bargaining unit. The Legislature has now established a distinct school board which will be responsible for the provision of French-language education. The *Ottawa-Carleton French-Language School Board Act, 1988*, S.O. 1988, c. 47 ("Bill 109"), which came into effect on June 29, 1988 (except for two sections not here relevant which were deemed to have come into effect on April 30, 1988), creates The Ottawa-Carleton French-language School Board ("the French-language Board") and gives it responsibility for the provision of French-language education in the City of Ottawa and the surrounding townships, cities and villages specified therein (that is, the Regional Municipality of Ottawa-Carleton). Since January 1, 1989, the English-language boards in the Ottawa-Carleton area, namely the Ottawa Board of Education ("the Ottawa Board"), the Carleton Board of Education ("the Carleton Board"), the Ottawa Roman Catholic Separate School Board ("the Ottawa Separate Board") and the Carleton Roman

Catholic Separate School Board ("the Carleton Separate Board"), have not been subject to Part XI of the *Education Act*, by virtue of subsection 1(5) of Bill 109.

4. In this application, the applicant, l'Association des enseignantes et enseignants suppléants d'Ottawa-Carleton élémentaire séparée ("l'Association"), seeks to be certified to represent occasional teachers and "part-time supply instructors" employed by the respondent, Conseil scolaire de langue française d'Ottawa-Carleton (section catholique) ("le Conseil de langue française, catholique"). (In referring to the provisions of Bill 109, the English language "French-language Board" will be used; in referring to the respondent, the French language "Conseil de langue française, catholique" will be used.) Le Conseil de langue française, catholique maintains that it is not the employer of the persons whom l'Association seeks to represent and will not be the employer until September 1, 1989. In addition to the major question of whether l'Association has named the appropriate respondent, this application raises several other issues: l'Association's status as a "trade union"; the description of the bargaining unit and the voting constituency; the applicability of the lists of employees supplied by the respondent; the timeliness of the application; and who should receive notice of the application. None of these issues prevents our holding a pre-hearing representation vote; all of them can be addressed by the parties at a hearing scheduled after the vote has been taken.

5. Under the Ontario *Labour Relations Act* ("the Act"), only trade unions within the meaning of clause 1(1)(p) of the Act may be certified to represent employees. By letter dated May 4, 1989, the Registrar informed the applicant that it had not been found in any previous proceeding to be a trade union within the meaning of clause 1(1)(p) of the Act; nor had an organization with a "similar" name been found to be a trade union. The letter invites the applicant to advise the Registrar's office if the information is incorrect. L'Association does not appear to have done so and will therefore be required at the hearing scheduled after the taking of the vote to adduce evidence which will satisfy the Board that it is in fact a trade union within the meaning of clause 1(1)(p) of the Act. Le Conseil de langue française, catholique raised no allegation relevant to l'Association's being found to be a trade union.

6. The remainder of the issues in this application can only be fully understood in the context of the application of Bill 109 and the relationship and interplay among Bill 109, the *Education Act*, the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464 ("Bill 100") and the *Labour Relations Act*.

7. The identity of the respondent raises two issues: the first is whether le Conseil de langue française, catholique is the employer of the employees for whom certification is sought or, put another way, whether the application is, as the respondent claims, premature; the second issue, which we raise, is whether "le Conseil de langue française, catholique" is the employer in this context or whether "le Conseil de langue française", without specification of the sector "catholique", is the employer (in this regard, the parties appear to agree that the employer is or would be the sector "catholique", but disagree on how that should be reflected in the respondent's name). On the second issue, by analogy, the Board does not certify a trade union to represent employees of a division of a corporation, but rather names the corporation as the employer and limits the bargaining unit to employees in that division: see *Beatrice Foods (Ontario) Limited*, [1982] OLRB Rep. June 815. In this context, the issue is whether the French-language Board or a sector of the French-language Board (see para. 8 below) is the employer.

8. The French-language Board has been in existence since December 1, 1988 and has had "the powers" of a [school] board under the *Education Act* and the obligation to provide school instruction in "French-language instructional units" (that is, "a class, group of classes or school in

which French is the language of instruction”) since January 1, 1989. The French-language Board is composed of the “public sector”, the Roman Catholic sector” and the “full board”. It should be understood that the “full board” is an entity distinct from “the French-language Board” and is comprised of the two sectors.

9. The public sector and the Roman Catholic sector is each responsible for providing education in both elementary and secondary schools, but in doing so they are “govern[ing] for the French-language Board”. Section 26 of Bill 109 specifically states that “[s]ubject to this Act, the Roman Catholic sector has all the powers and shall perform all the duties that the *Education Act* confers or imposes on a secondary school board” (the powers and duties of boards of education are set out in Part VI of the *Education Act*) and there are various provisions which state that provisions of the *Education Act* apply to the full board and each of the sectors “as if they were boards”. Each sector is given exclusive jurisdiction over a variety of responsibilities and concerns, including the determination of programmes to be offered in its schools, investing and borrowing money and the terms and conditions of employment of teachers and other employees and specifically, under paragraph 4(1)20, “Collective bargaining in respect of teachers and other employees”. Collective bargaining is one of the matters over which the sectors may transfer their jurisdiction to the full board; by operation of subsection 4(6), however, the jurisdiction is transferred back at the end of the term of office of the members of the sector who had transferred it to the full board and it may be transferred back prior to that time. Each sector also “shall exercise exclusive jurisdiction on behalf of the French-language Board in respect of the acquisition of real or personal property that is to be used by that sector”. The full board has exclusive jurisdiction over specified matters such as “maintaining buildings and premises and furniture and equipment for the French-language Board”, providing insurance and collective bargaining and the terms and conditions of employment of employees engaged in matters within the full board’s jurisdiction. By subsections 3(6) and (7) a decision of the members of a sector or of the full board with regard to any power, duty or right assigned to the sector or full board is a decision of the French-language Board.

10. Bill 109 envisions the transfer of both personnel and property (real and personal) from English-language boards to the French-language Board. With respect to the latter, section 59 provides for the transfer of schools which had been used for French-language instruction by the English-language boards. Those sites transferred by the Ottawa Board and by the Carleton Board are to be allocated to the public sector and those transferred by the Ottawa Separate Board and by the Carleton Separate Board are to be allocated to the Roman Catholic sector (although shifts in enrolment may result in a re-allocation by resolutions of both the sectors). Transferred assets and reserves are allocated in the same way, with each sector allocating a portion of such assets to the full board.

11. The transfer of teachers and other employees or their services is dealt with in Part XIII of Bill 109. There are four ways in which the French-language Board will acquire from the English-language boards the means of carrying out its mandate under Bill 109.

12. English-language boards “shall” assign the “services” of certain employees to the French-language Board from January 1, 1989 until August 31, 1989 or until an earlier date agreed upon by the boards. The French-language Board pays for such services. There appears to be no provision for a transfer of the contracts governing the employment relationship of any such employees to the French-language Board. This assignment is consistent with the cessation of the English-language boards’ obligations under Part XI of the *Education Act* at the same time the French-language Board undertakes the responsibilities of providing instruction in the French-language and the period of the assignment is consistent with the provisions for transferring employees themselves, rather than their services, which can occur in three ways.

13. The first way in which employees are to be transferred is through "designation" under section 63 of Bill 109 ("the designated employees"). These are employees who are assigned or recruited by the English-language boards exclusively for work in relation to French-language instructional units as of December 1, 1988. The contracts covering designated employees "are to be transferred to and assumed by the French-language Board effective the 1st day of September, 1989".

14. Bill 109 also contemplates that there will be employees of the English-language boards whose services will not longer be required by those boards after the French-language Board has been formed and that the latter will need to fill positions. The public sector is to enter into an agreement with each (or both) of the Ottawa Board and the Carleton Board and the Roman Catholic sector is to enter into an agreement with each (or both) of the Ottawa Separate Board and the Carleton Separate Board by which, among other things, they are to select the employees to be transferred under section 64 of Bill 109 ("the selected employees") in 1989, 1990 and 1991, effective September 1st of the relevant year. The contracts covering selected employees will be "transferred to and assumed by the French-language Board" effective the September 1st following the date of the agreement "or such earlier date as all of the boards may agree upon".

15. Finally, employees for whom there is no position in either the English-language boards or the French-language Board (identified through the agreements referred to in paragraph 14 above) are by virtue of section 65 of Bill 109 entitled to training assistance and to employment during training and afterwards by the relevant sector or English-language Board. The contracts of the employees for whom the French-language Board is responsible under section 65 are to be "transferred and assumed by the French-language Board" effective the September 1st following the date of the agreement "or such earlier date as the parties to the agreement may agree upon".

16. Regardless of the manner in which employees and their contracts are to be transferred from English-language boards to the French-language Board, the contracts of employees transferred from the Ottawa Board or the Carleton Board are under the jurisdiction of the public sector and the contracts of employees transferred from the Ottawa Separate Board or the Carleton Separate Board are under the jurisdiction of the Roman Catholic sector.

17. Section 67 of Bill 109 in part states that the terms of employment of employees transferred in 1989 who were working in a building transferred to the French-language Board will be determined under the collective agreement that applies to them immediately before the transfer until the French-language Board reaches a new collective agreement. The terms of employment of transferred employees who were not working in a building that was transferred and who were covered by a different collective agreement than employees having substantially the same job description who were working in a transferred building will be determined under the collective agreement covering employees with substantially the same job description transferred from the same English-language board transferring the building in which the employees are to work. The French-language Board will determine which collective agreement applies if the employees are to work in a building which had not been transferred from an English-language board.

18. Finally with regard to the transfer of employees, section 75 of Bill 109 provides that for purposes of section 63 of the *Labour Relations Act*, employees transferred from the English-language boards to the French-language Board "shall be deemed to have been intermingled"; this provision, however, applies only to "employees who are not teachers".

19. That brings us to the meaning of "teacher" under Bill 109. Bill 109 does not specifically define "teacher", but appears to adopt the meaning under the *Education Act*, that is, "a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or

a secondary school in Ontario". The *Education Act* also specifically defines various kinds of teachers, including an occasional teacher, all of whom (except a "temporary teacher" who is "a *person* employed to teach under the authority of a letter of permission" [emphasis added]) are defined by reference to being "a teacher". The same categories appear to apply under Bill 109.

20. Labour relations with respect to teachers is generally dealt with by Bill 100 and not by the *Labour Relations Act* since clause 2(f) of the Act excludes "a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*"; however, the labour relations of occasional teachers are not governed by Bill 100 but by the *Labour Relations Act* since the definition of teacher in Bill 100 does not encompass occasional teachers: see *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273. This division of jurisdiction appears to continue under Bill 109. We note in this regard that le Conseil de langue française, catholique does not challenge the Board's jurisdiction to entertain this application for occasional teachers (nor, it appears, does it challenge our jurisdiction over supply instructors, although it does object to their inclusion in a bargaining unit with occasional teachers).

21. For the purposes of Bill 100, section 74 of Bill 109 deems the Roman Catholic sector to be a Roman Catholic separate school board in respect of its elementary schools and a secondary school board in respect of its secondary schools; the public sector is deemed to be a public board in respect of its elementary schools and a secondary school board in respect of its secondary schools. Bill 100 specifies the "affiliates" of the Ontario Teachers' Federation which are to represent teachers in bargaining and Bill 109 deems certain "branch affiliates" to exist for the purposes of Bill 100 and each of those bodies is deemed to have given notice of desire to negotiate under section 9 of Bill 100. Insofar as occasional teachers are not subject to Bill 100, the relevance of section 74 of Bill 109 for occasional teachers is not clear.

22. The scheme of Bill 109, the timing and manner of its implementation, the circumstances under which it treats the sectors as "school boards", the jurisdiction granted to the sectors (and the full board) and the relationship between the sectors and the French-language Board are all relevant both to the identity of the employer (the French-language Board or a sector) and to whether the named respondent is the employer for the purposes of this application. Accordingly, the parties will be required to address these aspects of Bill 109 in order to resolve those particular issues. In addition, the applicant has named the respondent as "Conseil scolaire de langue française d'Ottawa-Carleton (section catholique)", while the respondent has indicated its correct name is "La Section catholique du Conseil scolaire de langue française d'Ottawa-Carleton"; to the extent that that difference raises a distinct issue, it should also be addressed by the parties.

23. The next group of issues concern the description and composition of the bargaining unit and voting constituency. L'Association seeks to be certified to represent a unit of

all occasional teachers and part-time supply instructors employed by the respondent in its schools situated in the Regional Municipality of Ottawa-Carleton save and except those employees in any bargaining unit for which a trade union held bargaining rights as of April 25, 1989.

The position of Le Conseil de langue française, catholique, as articulated at the Officer's meeting, is that there be two bargaining units: one for occasional teachers "employed by the elementary panel of the respondent" and one for occasional teachers "employed by the secondary panel of the respondent". L'Association contends that the respondent does not have an elementary or secondary panel. In the public school system, the Board has found as appropriate bargaining units of occasional teachers differentiated by level of school: *The Board of Education for the City of Toronto*, *supra*; *The Peel Board of Education*, [1987] OLRB Rep. Dec. 1600. In the separate

school system, it has found as appropriate units undifferentiated in that way: *Carleton Roman Catholic Separate School Board*, *supra*. The parties will have an opportunity to address the number of bargaining units (and should refer, among other relevant factors, to the effect of sections 26 and 74 of Bill 109). For purposes of determining the voting constituency, we shall apply the usual principle in pre-hearing representation vote applications of assuming, without deciding, that the applicant's position is correct: there will be a single voting constituency with no reference to an elementary or a secondary panel.

24. Le Conseil de langue française, catholique objects to the inclusion of part-time supply instructors in the same unit as occasional teachers on the basis that they do not share a community of interest. The Board has found that it has jurisdiction over supply-instructors: *Metropolitan Separate School Board*, [1986] OLRB Rep. Sept. 1259. But it has not yet found a unit composed of both occasional teachers and supply instructors to be an appropriate bargaining unit: *The Huron Board of Education* (Board File No. 2473-88-R, February 17, 1989). The question is currently before the Board: *Muskoka Board of Education* (Board File No. 2842-88-R, March 8, 1989). Again, this is a question on which the parties will have an opportunity to present evidence and make submissions. At that time, they should also address the meaning of "part-time supply instructors"; the Officer's report gives no indication of what the applicant means by that term. For the purposes of the voting constituency, supply instructors will be included. The Board's usual clarity note with respect to the supply instructors will be added, since we have been given no reason to believe it does not apply to the "part-time supply instructors" referred to by the applicant.

25. Both the applicant and the respondent have employed the same exclusionary language which makes reference to bargaining rights held by other trade unions as of the application date. Following *The Sault Ste. Marie Board of Education*, [1987] OLRB Rep. Nov. 1425, the Board no longer uses that exclusionary language in occasional teacher bargaining unit descriptions, but rather language which reflects the scheme of Bill 100 and the interplay between it and the *Labour Relations Act*. There is no indication in the Officer's report why the parties have used the language they have and in particular, whether it relates to the way in which Bill 109 transfers employees and contracts from the English-language boards to the French-language Board and the continued impact of current collective agreements. There is no indication why the usual language is not applicable in this case. Accordingly, we shall describe the voting constituency using the Board's "usual" exclusionary language and the parties may explain later why their language is more appropriate.

26. Therefore, the Board determines that the voting constituency will be

all occasional teachers and part-time supply instructors employed by the respondent in its schools situated in the Regional Municipality of Ottawa-Carleton, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

Clarity Note: The term "occasional teacher" has the meaning assigned to it by section 1(1)(31) of the *Education Act*, and the term "supply instructor" means persons referred to in section 22(1) of Ontario Regulation 262 as amended by O. Reg. 233/88, section 18.

27. Under subsection 9(2) of the Act, the Board must determine whether the applicant has the appearance of support of not less than 35 per cent of the employees in the voting constituency at the time the application was made. It is this aspect of this application which gives us the greatest difficulty in determining whether to direct a pre-hearing representation vote or not. The other issues which we have considered above do not need to be resolved before the taking of a vote; they

can all be addressed at a hearing held after the vote has been taken. But the Board cannot direct a vote if it is not satisfied that the requirement of subsection 9(2) of the Act has been met (the "appearance" of 35% support) even if it is also possible that the resolution of the matters in dispute regarding the bargaining unit will result in the application's being dismissed without the vote's being counted because the applicant does not actually have 35% in the bargaining unit determined by the Board to be appropriate.

28. The respondent claims that it is not the employer of the persons who are the subject of this application and contends further that it has no records with respect to those persons. It says that the Ottawa Separate Board, the Catholic Separate Board and the Carleton Board are the employers (in this respect, we observe that we are not concerned with whether these persons are the employers, but only with whether the respondent is the employer) and it has obtained lists of occasional teachers from the Ottawa Separate Board and the Carleton Separate Board. These lists do not purport to be lists of employees who have in any way been transferred to the French-language Board or are to be transferred, but seem only to be lists of persons who were on the occasional teachers' lists for May 1989 in the case of the Carleton Separate School Board and for March 1989 in the case of the Ottawa Separate School Board for teaching in the French-language schools. The parties have treated these lists as the employee lists and "the count" has been determined based on those lists. The applicant seeks to add certain persons to those lists and also challenges the inclusion in the bargaining unit of certain persons on the lists.

29. The respondent states that by virtue of the *Education Amendment Act, 1986*, S.O. 1986, c. 21, as am. ("Bill 30") and section 73 of Bill 109, Garneau Secondary School was transferred from the Carleton Board to the Roman Catholic sector of the French-language Board. Section 73 of Bill 109 incorporates the provisions of Bill 30 which provide for the designation of employees and property to be transferred to Roman Catholic separate school boards in consequence of their assumption of the duties of secondary school boards funded by public funding. The Roman Catholic sector is deemed by Bill 109 to begin to perform the duties of a secondary school board on January 1, 1989. Under Bill 30, the contracts of employees designated to be transferred from the public to the separate system are transferred and assumed by the Roman Catholic sector effective September 1st following the date of the designation. The respondent contends that these employees ("Bill 30 employees") are covered by a collective agreement between the Ontario Secondary School Teachers Federation ("O.S.S.T.F.") and the Carleton Board, that the application is therefore untimely and that O.S.S.T.F. should be given notice of this application. The Officer's report indicates that the respondent contends that the Carleton Board is one of the three employers of the persons who are the subject of this application, but it is not clear from the report whether the respondent considers itself or the Carleton Board to be the employer of these particular employees. In any case, the applicant takes the position that the respondent is not the employer of these employees and that the application is timely. That is yet another issue which the parties can address at a later time.

30. We do not have any lists of the Bill 30 employees. Regardless of whether the lists provided by the respondent are the basis for the calculation or whether it is based on the lists as amended by the applicant's challenges, the applicant has the requisite appearance of support among the employees in the voting constituency on the application date. We do not know if it would enjoy the requisite appearance of support if the Bill 30 employees were included for the count. It is not necessary that the applicant have the appearance of not less than thirty-five per cent support of the employees in the voting constituency on all possible combinations, only that it have it on some combination. It may be, however, that we find at a later stage that with the inclusion of the Bill 30 employees, the applicant would not have met the requirement. Should that occur, the application would be dismissed without the ballots' being counted. On the question of notice to the

employees, notice will be posted in the respondent's schools. Normally, because occasional teachers have no attachment to a specific school, we mail them notice. In this case, the parties will run the risk that Bill 30 employees will seek to re-open these proceedings after they have apparently been completed. That is a risk that flows from a failure to provide the Board with the information necessary to satisfy all the requirements of the process.

31. Assuming at this stage that the Bill 30 employees do not need to be added to the list, it appears to the Board on an examination of the records provided by the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made.

32. Accordingly, we hereby direct the taking of a pre-hearing representation vote in this application for certification.

33. Voters will be asked whether or not they wish to be represented by the applicant in their employment relations with the respondent.

34. All employees of the respondent in the voting constituency on May 15, 1989, who are also in the voting constituency on the date the vote is taken will be eligible to vote.

35. The issues raised by the parties and by Bill 109 give rise to whether there are other entities which should be given notice of these proceedings, specifically any trade union which has been certified to represent Part XI occasional teachers who are the subject of this application or which has been voluntarily recognized by one of the English-language boards to represent Part XI occasional teachers. Apart from O.S.S.T.F., the parties have not named any entity which should receive notice. Again, they run the risk of having this matter re-opened should some entity subsequently be found to have an interest after the proceedings have been concluded. The parties are hereby directed to notify the Board of any other entity which should receive notice of this application.

36. We hereby direct that the Ontario Secondary School Teachers Federation be served with notice of this application, sent a copy of this decision and notified of the hearing to be scheduled after the taking of the vote.

37. We also note that the applications for membership are in the name of "L'Association des enseignantes et des enseignants suppléants" and that "Ottawa-Carleton" appears in the middle of the next line. The application has been filed by "Association des enseignantes et des enseignants suppléants d'Ottawa-Carleton élémentaire séparée". Any issue arising out of the difference in names can be addressed at the hearing after the vote. The membership evidence filed by the applicant contains the following omissions: on two applications, there is no date indicated; on three, no year appears; one is dated 1983 and another 1987; on two applications there is no name on the applicant portion which indicates who paid the \$1.00 and on one there is no collector. The Form 9 declarant will be required to satisfy the Board that he had made the inquiries necessary to sign the Form 9.

38. This matter is referred to the Registrar to make vote arrangements and to schedule a hearing for a date after the date fixed for filing a statement of desire to make representations to permit the parties to adduce evidence and/or make submissions on the following issues: the status of l'Association as a trade union; whether le Conseil de langue française, catholique is the employer of the persons who are the subject of this application and the proper name of the respondent; the description and composition of an appropriate bargaining unit; the status of the Bill 30

employees; the timeliness of the application; the Form 9 Declaration and the membership evidence; and any other matter arising out of the application.

0001-89-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. Cuddy Food Products Ltd. and Cuddy International Corporation c.o.b. as a partnership in the name of **Cuddy Food Products**, Respondent v. United Food & Commercial Workers' International Union Local 175 AFL-CIO-CLC, Intervener

Certification - Membership Evidence - Board inquiring into the reliability of the Form 9 - Place of Form 9 in certification proceedings reviewed - Board satisfied with the reliability of the Form 9 - Ballots counted - Application dismissed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

DECISION OF THE BOARD; June 28, 1989

1. The name of the respondent in the style of cause is hereby amended to read "Cuddy Food Products Ltd. and Cuddy International Corporation c.o.b. as a partnership in the name of Cuddy Food Products" ("Cuddy Foods") for reasons given below.
2. By decision dated April 21, 1989, the Board directed the taking of a pre-hearing representation vote in this application for certification brought by the applicant, Retail, Wholesale and Department Store Union, AFL:CIO:CLC ("Retail, Wholesale"), with respect to certain employees of Cuddy Foods who were already represented by the United Food & Commercial Workers' International Union Local 175 AFL-CIO-CLC ("U.F.C.W.").
3. The April 21st decision directed that a hearing be scheduled to permit the parties to address the issues of the respondent's legal name and allegations filed by the U.F.C.W. about the membership evidence. The decision also indicated that a small number of the membership cards filed were incomplete. Subsequently, but too late to give notice to the parties for the hearing already scheduled, the Board, as a result of an inquiry by a Labour Relations Officer directed by the Board, also put down for hearing the issue of whether an individual in whose name an application for membership had been filed as documentary evidence of Retail, Wholesale's support, had in fact signed the card filed ("the non-sign").
4. U.F.C.W. withdrew its allegations on the first day of hearing. Also on that day, the Board orally amended the style of cause to change the name of the respondent; on the second day of hearing, after recessing to consider the evidence and submissions on the issues of the "non-sign" and the Form 9, the Board ruled orally that we were satisfied about the validity of the card and about the reliability of the Form 9. This decision gives our reasons for those rulings.
5. With respect to the respondent's name, counsel for Cuddy Foods provided us with a copy of a resolution indicating that a partnership agreement had been entered into by Cuddy Food Products Ltd. and Cuddy International Corporation which provided that together they would "carry on business under the firm name and style of 'Cuddy Food Products'". The other parties did

not dispute that this was the proper name of the respondent and we amended the style of cause accordingly.

6. With respect to the "non-sign", we heard evidence from the person whose name appeared on the card as the applicant for membership, Choeun Por, the collector named on the card, Curtis Clyde, and the Form 9 Declarant, Tom Collins; the evidence of the latter two witnesses was also relevant to our inquiry into the sufficiency of the Form 9.

7. The signature of the applicant for membership on the impugned card did not resemble the signature purporting to be that of the same person, Mr. Por, filed by the employer as that individual's "specimen" signature. The Board therefore directed a Labour Relations Officer to inquire into whether Mr. Por had signed the card. Mr. Por told the Officer he had not signed the card and therefore the Board put the matter down for hearing. At the hearing, Mr. Por testified that he had signed the card and explained the discrepancy in what he had told the Officer and what he was telling us as resulting in the main from his concern that, with two unions involved, he did not want to be seen to be supporting the losing union and from some confusion as to which union the card indicated he supported. Mr. Por used a translator for much of his testimony, although he spoke English at the request of counsel for the U.F.C.W. at times; in any case, his testimony was somewhat confusing. Nevertheless, and after taking into account some discrepancies between the testimony of Mr. Por and that of Mr. Clyde (in particular on the question of who else was present when Mr. Clyde asked Mr. Por to sign the card), we concluded that Mr. Por did sign the card filed in his name. In that respect, the sufficiency of the Form 9 was not an issue.

8. We considered the reliability of the Form 9 with respect to the incomplete membership evidence, however. Certain cards lacked dates or failed to show that at least \$1.00 had been paid as membership fees. Other cards had printed signatures or initials. None of this information, in particular, the lack of \$1.00 payment, had been noted on the Form 9.

9. The importance of the Form 9 has been emphasized in the Board's jurisprudence over many years: see, for example, *Valley Transportation Company Limited*, [1963] OLRB Rep. Nov. 448, at pp. 451-452; *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444, at para. 22. Because the certification process under the Act relies heavily on documentary evidence filed by applicants for certification -- indeed a trade union may be certified solely on the documentary evidence it files if it evidences sufficient support which is not challenged --, the Board must be satisfied that it was obtained in accordance with the requirements of the Act. Form 9 is a statement by a responsible official of the applicant that membership evidence was gathered by the applicant's collector(s) in conformity with the requirements of the Act, set out by the Board in *Pebra Peterborough Inc.*, [1988] OLRB Rep. Jan. 76, at para. 32:

32. ... First, the basis of the declarant's knowledge must be personal experience or reasonable inquiries that the declarant has made. Second, the declarant must be able to declare that the collector named on the membership card actually received the payment of money from the membership who signed the card. Third, where exceptions exist to the declaration with respect to the second aspect, the declarant must note those exceptions in the particular instant. "**EXCEPT IN THE FOLLOWING INSTANCES:**" requires an itemized listing of exceptions. Fourth, and of critical importance given the purpose of Form 9 and the Board's reliance on the integrity of the declarant and therefore of the hearsay membership cards, the declaration must not contain any statements that the declarant knew or ought to know were material misrepresentations.

10. In some cases, the Form 9 Declarant may be the same person who collected all the membership evidence or witnessed the signing of the cards and payments of \$1.00, but more often the Declarant may have him or herself collected none or only some of the cards and must ask of those persons who did collect cards questions which satisfy him or her that the proper procedures

were followed; on other occasions, as in Retail, Wholesale's campaign in this case, the Form 9 Declarant may be two or three times removed from the collectors: Mr. Collins testified that he relied heavily on two "key organizers", Bob Lowe and Doug Reid. Mr. Lowe and Mr. Reid received cards themselves from collectors; however, other people in the office could also accept cards from collectors and then give them to Mr. Lowe or Mr. Reid (the secretary was specifically instructed to hand them over to a staff representative). Whoever received cards was to make the proper inquiries of the collector. Mr. Collins then made inquiries of Mr. Lowe and Mr. Reid before making his Form 9 Declaration.

11. The crucial issue is whether the inquiries Mr. Collins made were adequate to found the Form 9 Declaration. No one raised any allegation that either Mr. Lowe or Mr. Reid (or anyone else in the chain) did not make the appropriate inquiries, nor is there any evidence on that point except Mr. Collins' evidence that he had instructed them to make certain inquiries and understood they had done so. The evidence and submissions centred on the nature of Mr. Collins' inquiries. Mr. Collins stated that he asked and instructed Messrs. Lowe and Reid to ask of the collectors whether anyone signing an application for membership had borrowed \$1.00, whether they had ensured that the \$1.00 was that of the applicant for membership and whether they had witnessed the signing of the application for membership. On another occasion, he said that the direct questions he asked were: did the collector collect \$1.00; did the applicant pay \$1.00; did the collector witness the applicant's signature.

12. Mr. Collins' evidence was most troubling with respect to the requirement that the Form 9 Declarant satisfy him or herself that the applicant for membership paid the \$1.00 to the collector of his or her card -- or, put the other way -- that the person signing as the collector had collected the \$1.00 from the person who signed that card as the applicant for membership. There is no one particular way in which this question is to be asked; there is no formula. The test is whether the inquiry or inquiries would elicit the information required. On Mr. Collins' evidence alone we had some concern that while his inquiries certainly dealt with the payment and receipt of \$1.00, they did not necessarily make the connection between a \$1.00 being given by a particular applicant to a particular collector. But Mr. Collins' evidence was not the only evidence before us on this point. In the Board's questioning of Mr. Clyde, we had asked him what questions Mr. Collins asked him when he (Mr. Clyde) took him cards he had collected. His testimony was clear: "He wanted to make sure there wasn't any loaned money and that I'd definitely received \$1.00 from the person I'd signed up". While that is the testimony of only one collector and in itself indicates only that Mr. Collins asked Mr. Clyde that question, it is sufficient to resolve the difficulty we had with Mr. Collins' testimony. Mr. Clyde's testimony does not contradict that of Mr. Collins, but rather states more specifically and explicitly what Mr. Collins' evidence skirted around: not only that \$1.00 was paid and \$1.00 was received, but that it was paid by and to certain persons. On all the evidence before us on this question, we are therefore satisfied about the reliability of the Form 9 filed in this application. We are satisfied that Mr. Collins' failure to note exceptions does not stem from any failure by him to make reasonable inquiries, but from the failure of those of whom he made the inquiries to reveal, for example, the omission of "\$1.00" on a card, or, as Mr. Collins suggested, by poor proofreading by whose upon whom he relied - Mr. Collins did not knowingly make any material misrepresentations in signing the Form 9.

13. This case illustrates several aspects of the place of the Form 9 in the Board's certification proceedings. The first is the danger of "rote" inquiries which do not really address or do not address completely the purpose of the Form 9: the thrust of the declaration goes to the very specific transaction which is to take place between the applicant for membership and the collector of that person's application for membership. The best way to ensure that the applicant for membership has in fact paid \$1.00 and to obtain the best evidence that he or she has paid it on his or her

own behalf is to minimize the parameters of the transaction to the applicant for membership and the collector of that person's card. Where those parameters are extended, the extension must be reported on the Form 9: for example, the \$1.00 is paid to someone else or paid at a time different from the time the application was signed. It is only when the significance of the requirement is understood that the significance of the exceptions can be understood and explored.

14. Related to that consideration is the following: the Form 9 Declaration is not the same as ensuring that the membership evidence is satisfactory on its face, although the two are interrelated. It may be, for example, that every card shows that the card was signed on January 2, 1989 and that the \$1.00 was paid on January 2, 1989; what would not be revealed on the face of the cards is that in every case, the \$1.00 was not paid until two hours or some other period after the card was signed. Addressing oneself deliberately to the requirements of the Form 9 would compel one to consider the relevance of the timing of signing and payment. Certainly where there are no surface problems with the cards, the Form 9 is likely to be accepted as reliable without further examination -- but that can be so only if the Board remains satisfied that the Form 9 can stand alone because the nature of the inquiries and the purpose of the inquiries is understood. Thus it is not sufficient to review the cards and assume that because right words appear in the right places, the specific and explicit Form 9 requirements are met; that can be determined only through the appropriate inquiries.

15. It is also for that reason that the degree of deviance is not the critical issue. It may be that only one card out of 300 omits the reference to \$1.00 paid. But examination of the Form 9 declarant may reveal that he or she never inquired about whether the applicant for membership paid the \$1.00 him or herself. The discrepancies in or problems with the cards merely serve as a catalyst for the Board's examination of the Form 9 declarant which may engender other concerns about the collection of the evidence or the employer's involvement in the formation of the trade union (on the example above).

16. While we ruled orally and our reasons indicate that we were satisfied on all the evidence before us that the Form 9 is reliable, we must observe that Mr. Collins' testimony with respect to the inquiries he made and the instructions he gave Mr. Lowe and Mr. Reid, while all necessary, came dangerously close (from Retail, Wholesale's perspective) to failing to appreciate the specific significance and requirement of the Form 9 and to confusing the adequacy of the membership evidence with the reliability of the Form 9. And the submission from counsel that the extent of the irregularity is minimal in light of the number of cards filed does not distinguish between the appearance of the cards and the actual transactions which occurred in the signing of those cards. In other words, the purpose of the Form 9 is to go behind the cards themselves: the Board is capable of looking at the cards and seeing whether they are complete; it is not capable of examining the underlying transactions without calling all the employees who purportedly signed cards, for several reasons an undesirable and often impractical exercise, and it is for that reason that it relies on the Form 9.

17. Our April 21st decision had directed that the ballot box be sealed until further order of the Board. While the applicant had requested that we direct that the box be opened at the first day of hearing rather than waiting until we had determined the "non-sign", we concluded that it would be preferable to deal with the "non-sign" first. It is, of course, quite possible and it does happen that non-sign allegations or other membership evidence allegations are made after the vote has been counted; the result may be that an applicant may win a vote but nevertheless have the application dismissed. That is an unfortunate concomitant of the system and a desire to avoid it does not in any sense warrant sealing all ballot boxes until (for example) the time for making representations about an application or vote has passed. But where such a result is a foreseeable outcome of

an inquiry, it is preferable to avoid it. In this case, the non-sign did not *appear* to affect the entitlement to a vote on numerical grounds, but it *could* have resulted in a dismissal of the application because of the insufficiency of the Form 9 or because we were satisfied that the nature of the misrepresentation to the Board warranted dismissal of the application. Therefore, we declined to open the ballot box at that time. Once the outstanding matters of the "non-sign" and the Form 9 had been dealt with, however, we ruled orally that the box was to be opened and the vote counted and that was done at the conclusion of the hearing.

18. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 70(3) of the Board's Rules of Procedure following the counting of the vote.

19. On the taking of the vote, not more than fifty per cent of the ballots cast were cast in favour of the applicant.

20. This application is therefore dismissed.

21. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

22. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

0120-89-U Council of Printing Industries of Canada on behalf of Empress Graphics Inc., Applicant v. Graphic Communications International Union, Local 500M, Lithographers, Mike R. Zajac, Earl McDonnell and Cliff Robinson, Respondents

Strike - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly characterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Colin Morley* and *Robert Little* for the applicant; *J. James Nyman* and *M. R. Zajac* for the respondents.

DECISION OF THE BOARD; May 26, 1989

I

1. This is an application under section 92 of the *Labour Relations Act* alleging that certain employees of the applicant have engaged in an unlawful strike, and that the respondent union and

its officials have counselled, encouraged, procured, or supported that strike. It is also alleged that those union officials have engaged in acts which they know (or should have known) would result in an unlawful work stoppage. All of these actions are said to be contrary to sections 72, 74, and 76 of the *Labour Relations Act*. The pertinent portions of those sections are as follows:

72.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

• • •

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

* * *

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

* * *

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

Also relevant are sections 1(1)(o) and 42 of the Act:

1.-(1) In this Act,

• • •

- (o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

* * *

42.-(1) Every collective agreement shall provide that there will be no strikes or lock-outs so long as the agreement continues to operate.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision:

"There shall be no strikes or lock-outs so long as this agreement continues to operate."

II

2. In accordance with the Board's usual practice, the Board directed the abridgement of the time limits for filing pleadings, and put the matter on for hearing quickly. The Board noted the union's concern about such expedition, but denied the union's request for an adjournment so that it could file an application under section 1(4) of the Act asserting that two entities not directly involved in this matter were "one employer" for labour relations purposes.

3. After several short adjournments, the union and employer applicant were prepared to agree, *FOR THE PURPOSE OF THIS PROCEEDING ONLY*, that the factual submissions appearing in Schedule "B" of the application were true and provable. For convenience, those submissions are set out below exactly as they appear in the applicant's pleadings. I recognize that some of them really involve conclusions of law with which the union does not agree, rather than statements of fact with which it is in agreement:

1. The Applicant employer and the Respondent Union are parties to a collective agreement which was signed January 9th, 1989 and which provides for a term from January 1, 1988 to December 31, 1989. Respondents Zajac and McDonnell are officers of the Respondent Union. Respondent Robinson is shop steward and an employee of the Applicant employer covered by the said collective agreement. The Applicant employer is a graphics and printing company which, among other things, produces colour separations for the production of retail catalogues, flyers and newspapers inserts.
2. On or about Friday April 7, 1989, the Applicant employer commenced production on 96 pages of material for a Sears catalogue entitled "Fall Values" (the "Sears' job").
3. On the morning of Friday, April 7, 1989, Respondent Robinson informed Mr. Peter Steffen, President and Chief Executive Officer of the Applicant employer, that the members of the Respondent Union would be refusing to work on the Sears' job. Respondent Robinson stated that he was acting on orders from Respondent Zajac.
4. Peter Steffen telephoned Respondent McDonnell at the Respondent Union's office and Respondent McDonnell told him that the Respondent Union was ordering its members to cease performing work on the Sears' job.
5. Respondent Robinson then held a meeting with the members of the Respondent Union and he told them that they were to cease work on the Sears' job. He again stated that he was acting on orders from Respondent Zajac.
6. The members of the Respondent Union ceased to work on the Sears' job, thereby engaging in an unlawful strike in violation of the *Ontario Labour Relations Act*.
7. The Sears' job was removed from the premises of the Applicant employer and arrangements were made to have it completed elsewhere.
8. On or about Thursday, April 13, 1989, the Applicant employer received another order from Sears Canada. This job called for the production of another 96 pages of material for a Sears Canada catalogue entitled "Fall Catalogue" (the "Fall Catalogue").
9. In the afternoon of Thursday, April 13, 1989, Respondent Robinson informed Mr. Leo Stapelbroek, Vice President and General Manager of the Applicant employer, that Respondent Zajac had instructed him to tell the Applicant employer that the members of the Respondent Union would refuse to perform any work on the Fall Catalogue.
10. Leo Stapelbroek telephoned Respondent McDonnell at the Respondent Union's office and Respondent McDonnell told him that the Respondent Union was ordering its members to not perform any work on the Fall Catalogue.
11. No member of the Respondent Union performed any work on the Fall Catalogue, thereby engaging in an unlawful strike in violation of the *Ontario Labour Relations Act*.
12. The Fall Catalogue job was removed from the premises of the Applicant employer and arrangements are being made to have it completed elsewhere.

13. On numerous occasions, the Respondents have threatened the Applicant employer that they will continue to order the members of the Respondent Union to refuse to perform certain types of Sears Canada work as well as work from other major customers of the Applicant employer.

4. To complete the factual background, it is necessary to make some additional observations.

5. Empress Graphics Inc. has had an amicable relationship with the trade union respondent for many years. The existing problem arises only because of a labour dispute between a "sister" local union and *another* employer known as Photo Engravers and Electrotypers Limited ("Photo Engravers Limited"). That labour dispute was still ongoing at the time of the "work boycott" of which the applicant complains, and at the time of the hearing before me. The origin of the work stoppage at Empress Graphics Inc. can be traced, at least in part, to a letter from the President of that "sister local" which reads as follows:

February 22, 1989

TO ALL CANADIAN LOCALS

Dear Sister & Brother,

The following is a list of struck work emanating from Photo Engravers & Electrotypers Limited in Toronto, who locked out ninety (90) members of GCIU Local 10-C on Monday, February 20, 1989:

Sears Ltd.- Fall-Winter Catalogue (#209)
 - Sears Summer Sale Catalogue
 - Sears Winter Sale Catalogue
 - Sears Christmas Wish Book

P.E. & E. Ltd. also prints catalogues for Consumers Distributing and Radio Shack. Although all of this work may not be classified as struck work, we would appreciate you communicating with this Local before producing any of the work listed above.

Thanking you for your kind co-operation in this regard, I remain,

Fraternally yours,

"Gordon R. Churchill"

Gordon R. Churchill,
 President

Essentially this letter calls upon union members, in the name of solidarity, to refuse to work on certain items with which Photo Engravers Limited may have been involved at some stage or would have been involved but for the lockout.

6. The parties are agreed that I may assume, without finding, that the work on the "Sears job" was considered by the applicant's employees to be "struck work", and further that when those employees refused to work on the Sears job the employees were acting in accordance with both the instructions of their trade union representatives and their honest belief as to the effect of Article 34 of their collective agreement. Article 34 reads as follows:

Lithographic employees shall not be required to handle any work and shall not be discharged, disciplined, or discriminated against for refusing to handle any work coming from or to be sent out to any Employer where the members of the Graphic Communications International Union

are on strike or where there is a lock-out against the members of the Graphic Communications International Union.

That agreement also contains the usual (and required) clause prohibiting strikes or lockouts during the currency of the collective agreement.

7. From the employer's perspective, there is a real concern that work which it ordinarily does for Sears and Radio Shack will be disrupted because of an outstanding labour dispute involving a local union and employer with which it has no direct relationship. The employer's worry (and perhaps an irony in this case) is that the work in question, if disrupted, will be diverted to non-union enterprises in Canada or the United States, to the obvious detriment of both the employer and its employees. The applicant fears that adherence in the name of "solidarity" to the "struck work" provision mentioned above will result in significant financial loss and a loss of job opportunities for the union members it employs. The union does not dispute that possibility. Nor is there any dispute that the work boycott has disrupted the applicant's business.

8. For the purpose of completeness, I should mention that this is not the first proceeding before the Board involving "sympathetic job action" in relation to the Photo Engravers Limited dispute and efforts by the respondent union and its members to support their sister local. In an earlier decision the Board declared that a number of employees represented by the respondent union had engaged in an unlawful sympathetic strike, and directed that those employees terminate that unlawful activity. This is therefore, the second proceeding involving allegedly unlawful "spill over effects" from the *lawful* lockout of members of a sister local. In this case the target is Empress Graphics Inc., but as the Union letter indicates, any other employer could easily be involved despite (as here) a valid and binding collective agreement with the employer in question.

III

9. These are the essential facts. I shall return to their significance below. First it may be useful to refer briefly to the scheme of the *Labour Relations Act* and the definition of the term "strike" contained therein.

10. The definition of the term "strike" was in issue before the Board some years ago in *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569). In that case a number of employees left their jobs and refused to work because of their disapproval of the federal wage control legislation. There was no immediate dispute with their own employers, but the work stoppage had the effect of interfering with production at local work places. An employer, Domglas, sought a cease and desist direction in much the same way as the applicant does here. At page 573 the Board had this to say:

12. The definition of strike as found in the *Labour Relations Act* appears broad enough to encompass the kind of work stoppage that is the subject matter of this application. On its face, the statutory definition appears to require only that the work stoppage, or other disruption of work, result from the combined or concerted action of employees. The two essential conditions for conduct to be characterized as a strike, therefore, appear to be: 1) concerted employee activity; 2) some disruption of the employer's operation. The question is whether we should read into this definition a further condition that the conduct be carried out for the purpose of obtaining concessions from the employer, or some other employer.

11. The Board held that in order for an activity to fall within the definition of "strike", there need be no intention to extract concessions from the immediate employer. The definition of strike was broad enough to encompass purely sympathetic action such as that which is involved in this case. (Indeed the definition of lockout expressly contemplates such "sympathetic" employer action). This broad definition of the term strike was approved in a unanimous decision of the Divi-

sional Court reported as *Re United Glass & Ceramic Workers of North America et al.* (1978), 19 O.R. (2d) 353.

12. I should also note the subsequent decision of the Supreme Court of Canada in *Re Maritime Employers Association*, 78 CLLC ¶14,171. There, the Court affirmed that a concerted refusal to cross picket lines because of the commonly-held belief in union solidarity was nevertheless a strike. The notion of solidarity which provides the “glue” binding workers to their trade union and its purposes, could also provide the ingredient of “common understanding” necessary to meet the definition of the term “strike” in statutes such as the *Labour Relations Act*.

13. It is also important to emphasize the extent to which the Ontario statute prohibits *any* collective job action during the term of the collective agreement. Not only is the definition of the term “strike” a comprehensive one, but section 42 of the Act requires every collective agreement to contain a “no strike” clause. Parties are obliged to include in their contractual arrangements an absolute prohibition on collective action. If they do not, such clause is *deemed* to be included in the collective agreement.

14. The legislative formula and legal result can be stated quite simply. The collective agreement establishes a pact of industrial peace which endures until the agreement expires and the parties have completed the process of compulsory conciliation. During the term of the collective agreement there can be no *collective* job action, whether it be in support of demands by the employees themselves or in sympathy with fellow workers in other establishments. Such job action by employees is a breach of section 72 of the Act. If encouraged by trade union officials, it is a breach of section 74. If induced by “persons”, it may be a breach of section 76. In addition, any such job action is necessarily a breach of the “no strike” clause which must be included in all collective agreements in Ontario and which imports, as a matter of law, the statutory definition of strike.

15. Against this background, it is difficult to accept the union’s submission that a collective employee work refusal, which otherwise looks very much like a strike, and which otherwise would fall within the statutory definition of a strike, is, nevertheless not a strike because of Article 34 of the agreement.

IV

16. Counsel for the respondent union argues, quite ingeniously, that if the collective agreement defines circumstances in which employees are not required to work, it cannot be illegal for them to merely follow the terms of their collective agreement. Nor can the employer complain that they are doing so. Counsel notes that Article 34 of the current agreement has formed part of the parties’ collective bargaining relationship for many years, and he asks, parenthetically: how can the employer now repudiate that provision and seek, from the Board, an order which virtually nullifies that aspect of the bargain? If the employer has undertaken not to require work in particular circumstances, how can it now seek a direction forcing employees to work in those very circumstances? Counsel urges the Board to find either that, as a matter of interpretation, this concerted refusal to work does not meet the definition of the term “strike” because no work was properly required in the first place, or, alternatively, that the Board should not relieve the employer of obligations or undertakings into which it freely entered.

17. This argument, rooted in appeals to freedom of contract, has its attractions but, in my view, is not consistent with either the structure of the *Labour Relations Act* or the Board’s established jurisprudence.

18. When boiled down to its essence, the union's argument is that a bargaining party, bolstered by superior bargaining power, can, by verbal formula, determine what will or will not be a strike - notwithstanding section 42 of the Act and the panoply of provisions prohibiting collective action during the currency of a collective agreement. If the union's submission is accepted, it would be open to construct contractual language providing that no employees shall be required to work if the employer fails to capitulate to the union's position at the third stage of the grievance procedure, or if the employer refuses to acknowledge a union's jurisdictional claim, or if an employer discharges an employee for what the union believes is insufficient cause, or if the parent union, or a sister local, or the C.L.C. or the local Labour Council calls for sympathetic concerted job action. All that would be necessary is the verbal formula: "employees will not be required to work if ...", which in practical terms, may mean: "employees may strike when ...".

19. In the circumstances of this case I simply cannot accept the union's contentions; for, to do so, would virtually eliminate the legal, practical and policy thrust of the Act. It would accord to the parties the right, based upon their respective bargaining power, to define what is or is not a strike or lockout under the *Labour Relations Act* and would permit the very collective action for collective bargaining objectives which the statute purports to prohibit. That is not, in my view, an accurate reflection of the legislative intention, nor is it consistent with the Board's views expressed in cases involving similar issues.

20. In *King Paving*, [1976] OLRB Rep. June 291 and *Associated Freezers of Canada Limited*, [1972] OLRB Rep. May 445 there was a concerted refusal by employees to cross picket lines set up by another union, and in both cases, the employees pointed to provisions of their collective agreement which allowed them to refuse. The Board said - to put the matter colloquially - "you cannot contract out of the Act". The no-strike ban is imposed by statute as a matter of public policy, not the convenience or relative bargaining strength of the parties. It admits of no exceptions. Any private arrangement which purports to circumvent or avoid the thrust of the Act is void. A concerted refusal to cross a picket line was a strike even though the collective agreement purported to permit it. (See also *Hutchison Mechanical Installations Ltd.*, [1973] OLRB Rep. May 240, *Pitts Atlantic Construction v. Construction and General Labourers* [1982] 141 D.L.R. (3d) 164, and [1984] 17 D.L.R. (4th) 384 (Nfld. C.A.).)

21. In *Piggott Construction Company Ltd.*, [1969] OLRB Rep. June 399 the Board held that a trade union could not reserve a right to strike in favour of jurisdictional claims. In *Belmont Plastering Company Ltd.*, [1970] OLRB Rep. Mar. 1459 the Board held that a trade union could not reserve a right to terminate the collective agreement early and therefore put itself in a position to strike if an employer failed to remit union dues required by that collective agreement (see also section 52 of the Act). In *Dover Corporation (Canada) Ltd.*, [1972] OLRB Rep. May 435 the Board observed that the fact that there might have been alternative work available for the striking employees was irrelevant. They could not engage in a collective refusal of the tasks to which they had been assigned. Nor, in the exercise of the Board's discretion under section 92 of the Act, does it matter that there may be other remedies available to the aggrieved employer by way of damages or disciplining recalcitrant employees (see *Fabricated Steel Products Ltd.*, [1977] OLRB Rep. June 376).

22. In summary then, a perusal of the Board's jurisprudence in this area significantly diminishes the union's claim to some kind of "reliance interest" on its current contract language. The Board has, for years, routinely rejected efforts by parties to construct or rely upon collective agreement language that would permit mid-contract work stoppages.

V

23. In the instant case I am persuaded that the work refusal complained of is properly characterized as a sympathetic strike contrary to the *Labour Relations Act*, and that the named union officials encouraged that strike. Article 34 of the parties' collective agreement does not provide a defence because, even generously interpreted, it purports to permit a strike which the statute clearly prohibits. I do not think that it was open to the parties to negotiate a clause which in form and substance would, for an obvious collective bargaining purpose, negate the no-strike requirement which they are obliged to include in their collective agreement.

24. It may well be that clauses such as Article 34 would provide a defence to an employer's claim for damages or an employer's attempt to impose discipline on employees who are merely doing what their collective agreement permits them to do. I make no further comment about that. It is a matter which is more properly considered by an arbitrator if the employer seeks to pursue such course of action.

VI

25. Should I exercise my discretion to make a declaration and remedial directions? In my view, I should.

26. The labour dispute involving the sister local is still ongoing. There has already been one Board order concerning unlawful sympathetic action in respect of that dispute. The union letter urging employees to engage in such sympathetic action has not been repudiated. There is a reasonable basis for the employer's concern that, without a Board declaration and direction, there will be a repetition of the illegal job action which has already interfered with its business. Finally, it was drawn to my attention that clauses similar to Article 34 are common in collective agreements between the respondent union and printing establishments throughout Ontario. The issuance of a declaration and a direction may therefore have some educational effect foreclosing future illegal employee action and further proceedings before the Board.

27. For the foregoing reasons, the Board issued the declarations, directions and orders set out in its "bottom line" decision of April 19, 1989.

0191-89-R National Automobile, Aerospace and Agricultural Implement Worker's Union of Canada (C.A.W. Canada), Applicant v. Flo-Con Canada Inc., Respondent v. Group of Employees, Objectors

Certification - Practice and Procedure - Employees on Schedule C of employee lists not at work within the 30 day period prior to the application date - Earlier application where these employees would have been included in the unit withdrawn - Employer arguing that the 30-30 rule should not be applied because the union was gerrymandering by picking an application date more than 30 days after the lay offs - No reason to decline to apply the 30-30 rule - Employees on Schedule C excluded from the lists

BEFORE: Robert Herman, Vice-Chair, and Board Members E. G. Theobald and R. W. Pirrie.

APPEARANCES: *Tamara Heller, Clare Meneghini and Vince Tucker* for the applicant; *W. J. Hayter, D. Woodhead and Karen Beuch* for the respondent; *Jana Sebedusky* for the objectors.

DECISION OF THE BOARD; June 2, 1989

1. The name of the respondent is amended to read: "Flo-Con Canada Inc."
2. This is an application for certification in which the parties met with a Labour Relations Officer on the day scheduled for hearing of this matter, and reached agreement on certain matters in dispute between them.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that:

all employees of the respondent at its N.I. Wheel Division in Cambridge, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, and students employed during the school vacation period constitutes a unit of employees of the respondent appropriate for collective bargaining.
5. The respondent has filed numerous charges relating to the collection of the membership cards, and the sufficiency and reliability of those cards. In addition, the parties disputed which employees properly fell within the bargaining unit just described, and the Board turned first to a consideration of that issue.
6. As required by the Board's Rules of Practice, the respondent filed schedules listing the employees which the employer claimed fell within the bargaining unit described by the applicant. Schedule C requires that the employer set out the names of employees not at work on the application date, because they were laid off prior to that date. Schedule C filed by the employer in this application named eleven individuals, ten of whom were laid off March 13, 1989, with expected dates of recall ranging from May 3, 1989 to June 5, 1989. Thus the individuals listed on Schedule C were not at work (in the respondent's assertion) within the thirty day period immediately prior to the application date. Ordinarily in such circumstances, the Board would apply what is referred to as the "30-30 rule" and exclude from the bargaining unit all the individuals on Schedule C, as none of them were at work on the day the application was filed or on any day in the 30 days prior to the date of filing. It is the applicability of that rule to the circumstances at hand that forms the basis of the respondent's argument.
7. Section 7(1) of the *Labour Relations Act* reads as follows:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).
8. As can be seen, the Board is charged under this section with ascertaining the number of employees in the bargaining unit "at the time the application was made" (in this case the application was filed on April 18, 1989). The general approach taken by the Board in non-construction industry applications to determining which employees were in the bargaining unit at the time the application was made is as described in *Amplifone Canada Ltd.* [1967] OLRB Rep. Dec. 840:

14. Although the unit time is determined by the provisions of section 7(1), nothing is said in that

section or elsewhere in the Act concerning the method or criteria to be used by the Board in ascertaining the number of employees in the bargaining units at the material time. The determination as to whether a person is or is not to be numbered as an employee on the date of application is, therefore, left entirely to the discretion of the Board. To ensure consistency and order in its proceedings and with a view to the purely practical difficulties involved, the Board has adopted certain practices and rules of thumb applicable to the various situations which commonly arise in the employer-employee relationships.

15. As an assistance to the Board in arriving at a decision with respect to the number of persons in the bargaining unit, the employer is asked to file with the Board schedules listing its employees. The schedules form part of the reply required under section 7 of the Board's Rules of Procedure...

16. It is convenient to deal with the schedules now in reverse order. The rule of thumb applicable to Schedule "D" is that the Board, at the hearing, determines if the persons named thereon have worked within the month immediately preceding the date of application and have either returned to work within the month immediately following the date of application or are expected to so do. If these conditions prevail the employee concerned is considered by the Board to be an employee for the purpose of the unit count. If all are not fulfilled he is not numbered in the unit count.

17. Where an employee is listed on Schedule "C", he is found to be an employee for the purpose of the unit count if he worked at any time during the month immediately preceding the date of application and is to be recalled or has been recalled within the month immediately following the date of the application. Again, unless both conditions are met, such a person is not counted in the unit (*Bertrand & Frere Construction Co. Limited Case*, File No. 10347-65-R)..."

9. And in *The Board of Education for the City of Toronto* [1983] OLRB Rep. Feb. 273, the Board wrote as follows:

24. Thus, to be included as an employee in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work (or have been expected to return to work) within the one month period following the application date. (See also *Brewers Nursing Home*, [1981] OLRB Rep. July 852; *Irwin Toy Limited*, [1970] OLRB Rep. Dec. 912; *Keynorth Limited*, [1970] OLRB Rep. July 477; *Mobile Cartage and Distributors Ltd.*, [1968] OLRB Rep. Nov. 814; and *West Elgin District High School Board*, [1968] OLRB Rep. July 379.) This longstanding practice of the Board enables the parties to ascertain in advance of the hearing the persons who will be included for purposes of the count (see *Sydenham District Hospital*, [1967] OLRB Rep. May 135). A further reason for the existence of the practice is that it tends to exclude from the count persons who have not been at work during the trade union's organizing campaign and have not had an opportunity to express their support for or opposition to the trade union (see *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292). See also *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 460, in which the Board wrote (at paragraph 24):

"...[the thirty day] rule applies generally to all applications from outside the construction industry. In order to meet the requirements of this rule an employee must be at work both some time in the period thirty days prior to the date of the filing of the application and be at work, or expected to be at work, some time in the period thirty days after the date of application. These requirements take into account two concerns - that union and employers be able to identify the constituency of employees that will be used by the Board when assessing the degree of membership support enjoyed by an applicant; that some employees who are not at work at the date of the application may still have a sufficiently substantial employment attachment to justify inclusion in the employee constituency and a voice in the selection of the bargaining agent. The application of this rule results in what the Board considers to be the best balance between these two competing concerns. A heavy onus, therefore, rests upon any party seeking an exemption from this rule."

(In that case, which involved an application in respect of certain "dependent contractors", the Board declined to deviate from the thirty day rule.)

...

27. Board practices such as the "seven week rule" (described in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. April 503), and the "thirty day rule" described above, are guidelines, not "hard and fast" rules. However, since such guidelines are known, accepted and relied on by unions and employers alike, there is a substantial onus on any party requesting the Board to depart from such practices (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116, and *Sherman Sand and Gravel Ltd.*, *supra*). In the circumstances of the instant case, the Board does not find it appropriate to depart from its normal practice of applying the thirty day rule. Although the employment pattern for at least some of the respondent's occasional teachers is more sporadic than that of other persons employed by the respondent such as its "contract" teachers, we are nevertheless of the view that, in the context of the present case, the thirty day rule provides an appropriate balance between the legitimate interest of employees (not at work on the date of the application but nevertheless having a substantial employment nexus with the respondent) in having a voice in the selection or rejection of the applicant as bargaining agent, and the legitimate interest of the applicant and the other parties in knowing with a reasonable degree of certainty which persons will be included by the Board as employees for purposes of the count. The alternative approaches advocated by Mr. Brady and Mr. Edson would include as employees for purposes of the count a number of persons with little or no connection with the respondent's active work force of occasional teachers. Such persons would not have been identifiable by organizers seeking to contact "bargaining unit" employees in an effort to persuade them to join the applicant and support its certification. Similarly, they could not have been identified or contacted by objectors wishing to organize opposition to this application...

10. The applicant filed a prior application for certification on March 6, 1989, with respect to the same bargaining unit. As noted, the employees listed on Schedule C in the instant application were laid off on March 13, 1989. At the time of lay off no specific return to work date was provided. Thus, the employees listed on Schedule C, who would be excluded from the bargaining unit in this proceeding by the application of the 30-30 rule, would have been included within the bargaining unit in the first application (although we did not have evidence of this, the parties assumed so and the issue was litigated on the basis that the employees in question would have been in the bargaining unit for purposes of the first application). Also in the first application, the respondent employer on March 23, 1989 filed charges with respect to the membership evidence. The applicant union withdrew the first application on March 30, 1989, before the scheduled hearing day.

11. These facts were not in dispute but what was disputed was whether the union knew, before the expiry of thirty days from March 13th (when the employees on Schedule C were laid off), the identity of those employees so laid off. This 30 day period is significant in that employees on lay off more than 30 days immediately before the day the union filed its application would not be considered in the bargaining unit for purposes of the certification count, if the 30-30 rule is applied. Having regard to the *viva voce* evidence, we are satisfied that no later than April 6 or 7, 1989, the union knew of the names of the employees so laid off and the fact that they had been laid off as of March 13, 1989.

12. Based on these facts, the employer asserted that the 30-30 rule ought not to be applied. The employer noted that the union filed successive certification applications within a relatively short period, and the union knew the names of the laid off employees, within thirty days of the lay-offs. These laid off employees had been in the bargaining unit with respect to the first application, and the employer submitted that the union in effect was gerrymandering by intentionally picking an application date for the instant certification more than 30 days after the lay offs. By picking a date that would intentionally exclude employees on short layoff who had been included in the bargaining unit in the application earlier filed, the union was abusing the Board's process and to coun-

tenance such abuse was unfair to those employees. Counsel for the employer further submitted that the rationale for the applicability of the 30-30 rule did not apply in the circumstances, as the applicant union was aware of who these laid off employees were, the employees had been part of the organizing campaign with respect to the first application, and the union would in no way be hampered by requiring it to treat these employees as included within the bargaining unit. In essence, counsel argued that the 30-30 rule was never intended to be a vehicle that could be used by a union to intentionally pick a day for filing its application that would exclude people in these circumstances.

13. As the quotes from the prior cases set out above indicate, there are several rationales for the development and application of the 30-30 rule, a rule which has been applied for a great number of years. With the application of this rule, and the parties' awareness that the Board is extremely likely to apply it, at least in non-specialized sectors (for example, the construction sector is treated differently), the parties are able to predict with some reasonable degree of certainty which individuals are likely to be included within the bargaining unit. This enables the union to conduct its organizing campaign with attention only to those employees who are likely to be found by the Board to be within the bargaining unit, and similarly allows those who wish to object to the choice of bargaining agent to approach only those employees who will be given a say in this issue by the Board. But as the quoted passages also note, an additional reason for this practice springs from the very wording of section 7(1) of the Act, which dictates that the Board determine the employees in the bargaining unit as of "the time the application was made." Thus, a major concern for the Board in developing and applying this rule is to ensure that those employees who do not have a sufficient link with the employer as of the relevant time, the time the application was made, are not included in the bargaining unit for purposes of determining the success of the application. There are numerous and varied circumstances in which employees might not be at work within the thirty days prior to the application date and the thirty days subsequent thereto, such as vacation, absences because of illness, plant shut downs, and so on. The 30-30 rule is designed to provide some necessary degree of certainty in assisting parties in determining in advance which employees the Board will likely consider to have a sufficient link to the work place as at the time the application is made. Were the Board to lightly depart from the applicability of this rule, the ensuing litigation and delays would undercut the very purpose of the rule. There is no question that the 30-30 rule represents an arbitrary line which the Board has generally applied to determine who ought to be treated as falling within the bargaining unit. But it is an arbitrary line that has served the labour relations community and its constituencies well for a lengthy period of time. It is a rule of which the community is well aware. We were not directed to a single decision where the Board has declined to apply the 30-30 rule in circumstances where the nature of the work place is a fixed geographical location to which employees in the ordinary course would daily report for work.

14. Having regard to the rationale for the rule and the circumstances in the instant case, and assuming that the union intentionally chose an application date that would fall at least thirty days beyond the time at which the employees were laid off by the employer, we are satisfied that there is no reason in the instant case to decline to apply the 30-30 rule. It is neither gerrymandering nor an abuse of process for a union to be aware of the Board's rules of thumb and pick a time for filing its application that would take advantage of one of those rules. It was reasonable for the union to rely upon the 30-30 rule and the Board's applicability of it, and the union might well be prejudiced with respect to its organizing campaign should the Board now decline to apply the 30-30 rule and thereby include the employees in Schedule C in the bargaining unit. Further, and of greater import, is the fact that the individuals in Schedule C do not have a sufficient nexus with the work place as of the relevant time, the time the application was made, to cause the Board to include them in the bargaining unit. The employer chose to lay these employees off, and by the time the second application was filed, these employees had not been at work for over five weeks.

There was no evidence that any of them had in fact been recalled as at the time of the hearing on May 19, 1989. To include them in the bargaining unit now would be to give a say to these employees that would not seem justified in all the circumstances. This type of work place is one where employees report daily for work, and therefore the typical employee would expect to work regularly in the thirty days prior to the application date. That the union consciously and calculatedly picked a day for filing its second application that was more than thirty days from when the employees in Schedule C were laid off in no way detracts from the fact that those employees do not have a sufficient link with the work place as of the time the certification application was made to entitle them to a say in that application.

15. Accordingly, the Board will apply the provisions of the 30-30 rule and all the individuals on Schedule C will be excluded from the bargaining unit.

16. It was not disputed that if the individuals in Schedule C were excluded from the bargaining unit, the union would be in an automatic certifiable position, and it would be unnecessary to enquire into the voluntariness of either the revocations or the petitions filed. However, because of the charges with respect to the membership cards, the manner in which they were collected and their sufficiency and reliability, no certificate will issue at this stage.

17. This matter is to be re-scheduled for a hearing to deal with those allegations of the respondent. We note that these allegations are identical to the allegations filed in the first certification application, and deal with concerns over the collection of cards submitted for the first application, none of which has been filed in the instant application nor sought to be relied upon by the applicant. It is not apparent therefore of the relevance of these charges, but this matter can be dealt with at the next hearing date, if the parties are unable to resolve it between themselves before then.

18. In light of the parties' assessment of the number of days needed to enquire into the charges filed by the employer, the Board hereby directs that five further days of hearing be set for this matter. As the instant panel dealt only with the composition of the bargaining unit, and whether the Schedule C employees ought to be so included, this panel is not seized with respect to the consideration of the charges filed by the employer, or any other remaining matter.

19. This matter is referred to the Registrar.

1698-88-JD Four Seasons Drywall Systems and Acoustics Limited, Complainant v. Labourers' International Union of North America, Local 506 and Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters' and Joiners of America, Respondents

Jurisdictional Dispute - Jurisdictional dispute complaint filed by contractor in defence of a grievance filed by the Labourers Union - Complainant contracting for the supply and installation of drywall - Complaint relating to the off-loading, conveying and stock-piling of drywall - Work done by the supplier of building materials - Delivery included in price of materials - Union made no demand on the supplier as "employer" under s.91 - Board without jurisdiction to hear complaint

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

APPEARANCES: *Robin B. Cumine* for the complainant; *Elizabeth M. Mitchell* for the Labourers' International Union of North America, Local 506; *Joseph Liberman* for the Interior Systems Contractors Association of Ontario; no one appearing for the Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters' and Joiners of America.

DECISION OF THE BOARD; June 13, 1989

1. This is a complaint filed under section 91 of the *Labour Relations Act* in which the complainant Four Seasons Drywall Systems and Acoustics Limited ("Four Seasons" or "the complainant") has requested the Board to issue a direction respecting the assignment of certain work. The complaint was filed in defence of a grievance referred to the Board under section 124 of the Act by the respondent Labourers' International Union of North America, Local 506 ("the Labourers'") in File No. 1455-88-G. Another panel of the Board adjourned the referral in order to allow Four Seasons time to file this complaint. The Labourers' contended "...that the Board is without jurisdiction to hear this matter as a jurisdictional dispute....". A hearing was scheduled for the complaint in order to receive the submissions of the parties on the issue of whether the Board had jurisdiction to entertain it. The respondent Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters' and Joiners of America ("the Carpenters'") did not reply to the complaint and neither attended nor was represented at the hearing.

2. Subsection 91(1) of the *Labour Relations Act* provides as follows:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

3. Four Seasons had a contract for the supply and installation of drywall and other acoustic construction material for a highrise, senior citizens home in Scarborough, Ontario ("the project"). Each of the unions is bound together with Four Seasons to separate collective agreements, the "Carpenters' agreement" and the "Labourers' agreement". The Labourers' grieved that the complainant violated the subcontracting provisions of the Labourers' agreement with respect to the following work:

- (1) The off-loading of drywall at the point of delivery on the construction site;
- (2) conveying the drywall to local stock piles, if any, on the floors of the building, or to the point of installation; and
- (3) stock piling the drywall at the local stock piles, if any, or at the point of installation if there was no local stock pile.

That work is the work in dispute in this complaint. The work was performed on the project by the employees of Builders Supply Co. ("Builders") from which the employer purchased the drywall material. The standard terms of purchase provided for the material to be delivered to the local stock piles on each floor of the building. The price to the complainant would be the same if delivery was to the termination point of over-the-road access to the project site.

4. Whenever Four Seasons performs any of the work which is in dispute with its own employees, it assigns the work to employees who are represented in collective bargaining by the Carpenters' union. Complainant counsel and counsel for the Interior Systems Contractors Association of Ontario ("the Association"), an employers' organization which represents drywall contractors and is bound to the Carpenters' agreement, assert that it has been a long standing practice of the complainant and other contractors in the drywall industry to purchase drywall and acoustic materials for a price which includes delivery to the floor or floors of the building on which it is to be installed and have the supplier deliver it in accordance with that arrangement. They assert also that it has been a constant issue between the Carpenters' union and the Labourers' union as to which one has jurisdiction over the performance of that work. The Carpenters' agreement and the Labourers' agreement each claims jurisdiction over the work in dispute in this complaint and each agreement contains a provision that an employer bound by the agreement shall not subcontract work covered by it to any contractor who is not in a collective bargaining relationship with the union.

5. Counsel for Four Seasons submits that, were the Board to find that these facts do not satisfy the requirements of subsection 91(1), it would be denying its jurisdiction under the subsection because the grievance filed by the Carpenters' union on Four Seasons is a requirement that the work be assigned to employees represented in collective bargaining by that union. Furthermore, counsel submits, since it has been the complainant's practice and that of other contractors in the drywall industry to have drywall materials delivered to each floor of a highrise building on which it is being installed and since both unions claim the work, the Board has to decide which of the unions should do the work if it is going to come to grips with the issue before it. Counsel argues that, if the grievance proceeds without the Board first settling the dispute between the unions and if the Labourers' union is successful in its grievance, there is nothing to prevent the Carpenters' union from bringing its own grievance claiming that the complainant has breached the Carpenters' agreement by paying damages to the Labourers' union as though its members had performed the work. In these circumstances, it is argued, the Board has jurisdiction to entertain the complaint under subsection 91(1) and should exercise its discretion to do so in order that the dispute over which trade should perform the work will be decided in a forum in which all parties to the complaint will have standing to deal with the dispute.

6. Counsel for the Association focuses his argument on the long standing practice of the complainant and other drywall contractors of purchasing their materials under terms which include delivery to the floor of the building where they are to be installed and to the fact that Four Seasons is bound to collective agreements with each of the unions which contain conflicting claims for the work in dispute and which prohibit the complainant from subletting the work to a contractor which does not have a collective bargaining relationship with the particular union. Thus, counsel argues, the Board has before it circumstances where Four Seasons has two collective agreements, each of which is saying that the members of the union bound by the agreement should do the work and that the constant dispute between the Carpenters' and Labourers' over the work at issue attests to that fact. Since subsection 91(1) gives the Board a broad discretion to deal with that kind of dispute, the Board's discretion should be exercised to entertain this complaint.

7. Counsel for the Labourers' union submits that the employer which has control over assignment of the work in dispute is Builders. Its employees performed the work. Therefore, Builders is the "employer" to which subsection 91(1) refers. The Labourers' union has made no demand on Builders, either directly or through Four Seasons as agent of the Labourers' union. Therefore, this complaint does not satisfy the two preconditions of subsection 91(1), either one of which must be met in order for the Board to have jurisdiction to entertain the complaint. Counsel referred the Board to its decision in *Harold R. Stark Company Limited*, [1982] OLRB Rep. Feb.

222, and the earlier decisions referred to therein in support of its argument that the “employer” referred to in subsection 91(1) of the Act is the employer which has control over the assignment and for the proposition that the Labourers’ union has not demanded that employer to assign the work to members of the Labourers’ union. Counsel also relies on the decision in *Stark* in defence of the claim of counsel for the Association that the complaint comes within subsection 91(1) because Four Seasons is bound to separate collective agreements with conflicting claims for the work in dispute and similar subcontracting restrictions.

8. A fair reading of the wording of subsection 91(1) of the Act establishes that, in order for the Board to have jurisdiction to entertain this complaint, it must be either:

- (1) A complaint that “...a trade union..., was or is requiring an employer...to assign particular work to persons in a particular trade union, or in a particular trade, craft or class rather than to persons in another trade union or another trade, craft or class,...”, or
- (2) a complaint “...that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union,...”.

The complaint on its face does not satisfy the second precondition, therefore, in order for the Board to have jurisdiction, the complaint must satisfy the first one. The Board has, in a large number of complaints made under what is now subsection 91(1) of the Act, concluded that the subsection is directed to circumstances where a trade union is seeking to have the employer with actual responsibility for performing the work in dispute, assign that work to members of the claiming trade union. See *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247, referred to in *Stark*, *supra*, at paragraph 10.

9. In the *Stark* decision itself, the complainant Stark was a mechanical subcontractor which had obtained work by subcontract from the general contractor on a large project. Stark in turn sublet some of the work to a paving contractor. The paving contractor was bound to a collective agreement with a sister local of the Labourers’ union. Stark was bound to provincial collective agreements covering construction labourers and plumbers. The paving company had no contractual relations with the union representing plumbers. The plumbers union told Stark that certain of the work sublet to the paving company was work that should be done by its members and asked Stark to take back the work in question. It was understood by both Stark and the plumbers union that, if Stark did take the work back, it would use members of the plumbers union to perform the work. Stark did not take back the work and the plumbers union filed a grievance claiming that, by subletting the work to the paving company, Stark was in violation of the subcontracting provisions of the plumbers’ provincial collective agreement. The provision prohibited Stark from subcontracting work to another contractor who was not bound by the provincial agreement or a party to a collective agreement with the plumbers union. The Labourers’ provincial agreement to which Stark was bound contained a similar prohibition.

10. Within that factual framework, the Board dealt with the same issues which are raised in this complaint. Specifically, it dealt with the following contentions:

- (1) That the Board should not follow the *Napev* decision and those which preceded it and should treat Stark as an employer for purposes of subsection 91(1) on two grounds; first, the plumbers union sought to have Stark revoke its subcontract to the paving contractor, uniquely distinguishing this complaint from those cases and qualifying

Stark as an “employer” for purposes of subsection 91(1); and, second, because it was Stark, through its choice of subcontractor, that in fact determined which union’s members would perform the work, all of which should cause the Board to take a more “realistic” view of the complaint; and

- (2) that the Board’s decision in *Pre-Con Company, A Division of St. Marys Cement Limited*, [1981] OLRB Rep. July 947, referred to in *Stark, supra*, at paragraph 14, which issued after the *Napev* decision, supported the contention that the matters at issue could be dealt with by way of a section 91 complaint on either of two bases; first, because the plumbers union sought to use Stark as its agent to demand the work from the paving contractor; and, second, because Stark was bound to two collective agreements with conflicting provisions regarding the subcontracting of the work at issue.

With respect to the contention that the Board should treat Stark as an employer for purposes of subsection 91(1), on the first ground, the Board declined to accept the facts relied on as a material distinction from the earlier cases, because Stark never did become the employer and the work at issue was performed at all material times by persons employed by the paving contractor and to whom that contractor had assigned the work. On the second ground, the Board acknowledged that, because Stark could have determined which union’s members could have done the work through its choice of subcontractor or its decision to do the work, there was an argument for the Board to have jurisdiction to deal with work allocation disputes arising out of the enforcement of subcontracting provisions in collective agreements. However, the Board concluded that:

..., given the language of section 91(1), its legislative history and the interpretation given to the section over the years, we are satisfied that the section, as it is currently worded, does not cover the type of situation now before us, and that any possible widening of the scope of the section is a matter for the Legislature to deal with.

With respect to the contention that the Board’s decision in *Pre-Con* supported dealing with the matters at issue in *Stark* by way of a section 91 complaint, the Board accepted that a union can demand an assignment of work through another contractor acting as the union’s agent, but found as a fact that the plumbers union did not use Stark as its agent and Stark, on its own motion, did not approach the paving contractor with a request for the work. The Board at paragraph 15 of the decision rejected the premise that the Board in the *Pre-Con* decision was indicating that subsection 91(1) automatically applies in every case where an employer is bound together with different trade unions to separate collective agreements containing conflicting subcontracting provisions and one of the trade unions seeks to enforce the provisions in its collective agreement.

11. The circumstances of the instant complaint are closely analogous to those which were before the Board in *Stark, supra*. The Board herein agrees with the analysis in the *Stark* decision of the Board’s earlier jurisprudence and with its reasoning, and adopts that reasoning. It is clear in the instant complaint that the Labourers’ union has not made a direct demand on Builders to have the work performed by its members and, on the reasoning in the *Stark* and *Pre-Con* decisions, the Labourers’ union grievance against Four Seasons is not, in the circumstances of this case, a demand on Builders that the work be assigned to members of the Labourers’ union.

12. The Board understands the concern of the parties herein which led them to ask the Board to take a more realistic view of the Labourers’ union grievance and find it a demand for work for purposes of subsection 91(1) of the Act, but the Board concurs with *Stark, supra*, that to

do so would give the subsection a meaning not contemplated by the statute. That does not mean that trade unions or employers cannot have access to section 91 in situations where a trade union bypasses it and uses section 124 of the Act to claim work from a contractor other than the one who has assigned the work. The Board's jurisprudence, particularly *Stark*, supra, and those earlier decisions dealing with a general contractor acting as agent for the trade union claiming the work, offer ample guidelines as to the elements which are essential to bringing a complaint within subsection 91(1) of the Act.

13. It was also apparent in the submissions of counsel for the complainant and for the Association that what they see as the underlying work assignment issue would not be properly addressed if the Labourers' union grievance proceeds under section 124 of the Act. In that respect, we note that the Board in *Stark* addressed similar concerns at paragraph 16 and made the following observations:

...It may be that the concerns expressed about having what is essentially a jurisdictional matter dealt with at arbitration can in fact be dealt with in the context of the Board fashioning a remedy in the section 124 arbitration proceeding, assuming, of course, that a violation of the subcontracting provision in the applicable collective agreement is made out. Can it be said, for example, that a construction trade union has properly sought to mitigate the damages in circumstances where it is alleging a violation of a subcontracting provision, but at the same time has refrained from seeking an assignment of the work from the employer actually responsible for assigning it. Similarly, it may be open to question as to whether in a section 124 proceeding any order should go requiring an employer to cease subletting certain work to a firm employing members of one union, and requiring him to do it himself or have it done by another contractor using members of the grieving union, in circumstances where although the matter arises out of a jurisdictional dispute the grieving union has not brought the matter within the provisions of section 91 so as to allow the jurisdictional issues to be properly canvassed and ruled upon. This is particularly so in light of the fact that the subcontractor and the union whose members are actually performing the work will likely not have standing to participate in the section 124 arbitration proceedings. We raise these issues only as matters which perhaps should be addressed at a later time, and reach no conclusions with respect to them.

14. In all of these circumstances, the Board finds that this complaint does not come within the provisions of subsection 91(1) of the *Labour Relations Act* and the Board has no jurisdiction to entertain it. The complaint is dismissed.

0927-88-M Laundry and Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, Goldcrest Furniture Ltd., Respondent v. Gerardo Mercante, Vincenzo Reda, Franco Bini and the United Steelworkers of America, Interveners

Evidence - Membership Evidence - Steelworkers Union seeking reconsideration of Board decision consenting to the early termination of a collective agreement on the grounds that, *inter alia*, the employees did not have notice of the request - Union seeking to introduce membership cards to corroborate direct evidence relating to its organizing campaign - Cards of limited probative value - Board exercising its discretion to refuse to admit the cards in evidence

BEFORE: S. A. Tacon, Vice-Chair, and Board Members J. A. Ronson and E. G. Theobald.

APPEARANCES: *Bernard Fishbein* and *Fernando da Silva* for the applicant; *Stewart Saxe* and *Anna Lavalatta* for the respondent; *Brian Shell*, *Brando Paris* and *Tom Steers* for Gerardo Mercante, *Vincenzo Reda*, *Franco Bini* and the *United Steelworkers of America*, interveners.

DECISION OF THE BOARD; May 31, 1989, as amended July 4, 1989

1. This is a request for reconsideration of the Board decision dated August 15, 1988 consenting to the early termination of the collective agreement then in operation. For convenience, the party seeking reconsideration (technically, the United Steelworkers of America and the specified individual members of the bargaining unit) is referred to as the USWA. The incumbent trade union is referred to as the Teamsters and the company as Goldcrest.

2. During the hearing, an issue arose as to the admissibility of membership cards sought to be tendered by the USWA. It is useful to note at this point that the membership cards in question had never been submitted in support of a certification application by the USWA, although it was a certification application by the USWA in which it was seeking to displace the Teamsters (Board File 2963-88-R) which led to the instant request for reconsideration. The parties' respective positions may be briefly summarized as follows.

3. The USWA asserts the membership cards are relevant to its assertion that the USWA engaged in an organizing campaign with respect to the employees of Goldcrest in December 1987 and as physical evidence corroborative of their witness's testimony (B. Paris). The cards are tendered to establish their existence and number (approximately 100) but not for the identities of the signatories, the dates, the collectors, etc. It is also submitted that the cards fall within the scope of section 111(1) of the *Labour Relations Act* and should not be disclosed by the Board.

4. Counsel for Goldcrest submitted that the membership cards were irrelevant to the issue before the Board, which is whether the employees in the bargaining unit had notice of the request for early termination of the collective agreement. If the cards were relevant to this issue or to the alternative argument that the USWA was entitled to notice, counsel submitted the company was entitled to examine those cards. That is, the company asserted that, if the cards were admitted, the company needed to know the names of the signatories in order to respond to the question as to whether the USWA had notice and whether the company was or should have been aware of the USWA organizing campaign. Moreover, it was contended that the reasons for confidentiality, as protected in section 111(1), did not apply to the instant context wherein the company had been organized by one or another trade union for many years.

5. Counsel for the Teamsters submitted he was entitled to examine the cards on several grounds. Firstly, although section 111(1) may be construed as protecting the confidentiality of the cards, that the cards were not submitted in support of a certification application and were voluntarily proffered as relevant evidence by the USWA supported the exercise of the Board's discretion to permit disclosure on the usual principle that all parties are entitled to examine the exhibits. It was also argued that, in tendering the cards as evidence, counsel for the USWA waived the protection of section 111(1). Counsel for the Teamsters adopted the submissions of company counsel with respect to relevance. In addition, counsel contended the USWA organizing campaign in December 1987 was not relevant to the application for early termination of the collective agreement between the Teamsters and Goldcrest in August 1988. Moreover, it was argued that the identities of the signatories were arguably relevant to the question of the delay of roughly seven months in filing the instant reconsideration request. Counsel added that whether the cards were corroborative of the witness's testimony could not be tested by the other parties without disclosure of the cards. Thus,

counsel submitted that the cards should not be admitted in evidence or, if so admitted, should be disclosed.

6. The Board must, then, determine whether the cards are admissible or whether they should be admitted as a matter of Board discretion and, if admitted, whether the other parties should be permitted to examine the cards, also as a matter of Board discretion. The Board first considers the question of section 111(1) and then the question of the cards' admissibility as a matter of law and Board discretion.

7. Section 111(1) of the Act establishes the confidentiality of membership evidence and provides that such information may only be disclosed upon consent of the Board: see *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223 for a review of the background to the section. In exercising its discretion to determine whether the identity of a union member should be disclosed, the Board has been understandably circumspect and has balanced the clear legislative intention to regard such material as confidential against the other relevant factors in a particular case. Generally, except in circumstances wherein the Board proceeds with a non-pay or non-sign allegation, the Board has refused to permit questions to be asked which would disclose a member's identity or to permit the inspection of the membership cards unless that right is waived by the union and the individual concerned: *Grand & Toy, supra*; *Dominion Paving Limited*, [1986] OLRB Rep. June 705; *K Mart Canada Limited*, [1982] OLRB Rep. Nov. 1660; *Thames Steel Construction Ltd.*, [1980] OLRB Rep. Apr. 545; *Radio Shack*, [1978] OLRB Rep. Nov. 1043.

8. In this instance, the cards are not submitted in the context of a certification application. This is a request for reconsideration of a decision consenting to the early termination of a collective agreement in which the party tendering the cards is an applicant in another certification application (Board File 2963-88-R); the membership cards here in question were not submitted in support of that application either. In the Board's view, notwithstanding the unusual context, the wording in section 111(1) is broad enough to extend to the membership cards in question. Further, even if it may be said the USWA has "waived" its rights with respect to the confidentiality of the cards, the Board does not consider that the USWA has the authority to waive the entitlement of each signatory to the cards to non-disclosure of his/her identity. On this aspect, the Board rejects the assertion by Teamsters counsel that, by tendering the cards, the protection afforded by section 111(1) has been "waived".

9. Given that section 111(1) is applicable in the instant circumstances does not resolve the question of whether the Board should exercise its discretion to permit the other parties to review the membership cards. In determining that question, the Board must have regard to the purpose for which the cards are tendered, the relevance of the cards to the issues in dispute, their probative value and the potential prejudice to the other parties in not permitting those parties the right to examine the cards.

10. The issue before the Board is whether the Board should reconsider its decision in August 1988 consenting to the early termination of the collective agreement between Goldcrest and the Teamsters. The USWA asserts reconsideration should be granted on the grounds that there was no notice, or no reasonable notice, to the employees or to the USWA of the early termination request, notwithstanding the USWA's organizing campaign in December 1987. The company and the Teamsters reject those assertions as matters of fact and of law in that, it is argued, notice was not required to be given to the USWA.

11. In this context, the membership cards are hearsay evidence potentially corroborative of the USWA's direct evidence that it initiated an organizing drive in December 1987. The Board may, in its discretion, admit hearsay evidence by virtue of section 103(2)(c). The cards, of them-

selves, do not establish whether the signatories were employees in the bargaining unit as at December 1987 nor do they establish the extent of the USWA's support amongst bargaining unit members. To resolve these questions, the membership cards must be compared with a schedule of employees in the bargaining unit as at that date. Even if the company could construct a list of bargaining unit members as at December 1987 at this point in time (May 1989), verification of that list (as would occur in the context of a certification application) by the USWA and the Teamsters would be exceedingly difficult. Moreover, the level of the ostensible support for the USWA in December 1987 is not directly an issue before the Board. In any event, the USWA may seek to prove that fact, to the extent that it is arguably relevant, through the leading of direct evidence of its organizer, as it has done.

12. At this juncture, the Board is prepared to assume the cards are arguably relevant to the issues. However, even on this assumption the limited probative value of the membership cards, as hearsay evidence submitted without a declaration as to their authenticity and without the context provided by the schedule of employees in the bargaining unit, must be considered with respect to whether the Board should exercise its discretion under section 111(1) and whether the Board should exercise its discretion to admit the cards at all.

13. The Board must also consider the potential prejudice to the other parties should the cards be admitted but not disclosed. Counsel for the company asserts knowledge of the identities of the USWA's supporters is relevant to the question of notice; counsel for the Teamsters concurs and, as well, contends their identity is relevant to the question of delay in filing the reconsideration request. In its view, the Board need not conclusively determine this issue but notes its reticence to permit evidence to be tendered by one party but not disclosed to the other parties. In (non-construction industry) certification applications, the membership evidence is supported by a Form 9 Declaration attesting to its authenticity. That confirmation is not present in the instant case. The Board affirms the jurisprudence wherein the Board has held the section 111(1) protection does not prejudice a respondent given the issues in dispute in certification applications except where the Board proceeds with non-sign or non-pay allegations wherein the relevant identities are disclosed (see, for example, *Grand & Toy, supra*). The assessment of potential prejudice therein, however, is not readily analogous to the instant proceedings given the quite different matters in dispute.

14. Thus, the potential prejudice to the other parties of non-disclosure in proceedings other than certification applications would argue for the Board's exercise of its discretion to consent to the revealing of the identities of the signatories to the membership cards. Conversely, the Board's long-standing reluctance to reveal an individual's support for a trade union in accordance with the legislative intent of section 111(1) except in respect of non-sign or non-pay allegations (where the Board hears such allegations and, therefore, disclosure is unavoidable), would support continued confidentiality. A critical factor in the instant case is the limited probative value of the cards and the context of the issues before the Board. In this regard, the Board need not repeat its analysis in paragraphs 11 and 12. The Board considers that the competing interests may be balanced by exercising its discretion to refuse to admit the membership cards. In so doing, the Board is preserving confidentiality and not prejudicing the other parties. Further, the Board notes that the USWA has already led direct evidence seeking to establish that the USWA conducted an organizing campaign among the employees of Goldcrest in December 1987. This ruling only precludes the leading of hearsay evidence in the form of the membership cards seeking to corroborate that direct evidence.

15. For the foregoing reasons, the Board rules that the membership cards may not be admitted.

16. This matter is referred to the Registrar.

0239-89-R; 0240-89-U Toronto Typographical Union, Number 91, Printing Publishing and Media Workers Sector of the Communications Workers of North America, Applicant v. **Innopac Inc.** Purity Packaging, Progressive Packaging Limited, Condor Laminations, Respondents; Toronto Typographical Union, Number 91, Printing Publishing and Media Workers Sector of the Communications Workers of North America, Complainant v. **Innopac Inc.** Purity Packaging, Progressive Packaging Limited, Condor Laminations, Respondents

Practice and Procedure - Counsel for the respondent asking the Board to rule on two "preliminary" matters - Board not obliged to deal in a "preliminary" manner with any issue - Respondent's arguments can be raised before the panel that hears the merits of the applications

BEFORE: Owen V. Gray, Vice-Chair, and Board Members G. O. Shamanski and E. G. Theobald.

APPEARANCES: Nelson Roland, Lori Newton and Douglas W. Grey for the applicant/complainant; Robert Salisbury, Michael Cooke and Ted Hutcheson for the respondent.

DECISION OF THE BOARD; June 8, 1989

1. Board File 0239-89-R is an application under subsection 1(4) of the *Labour Relations Act* ("the Act") for a declaration that the respondents constitute a single employer for the purpose of the *Labour Relations Act*, and certain other relief. It appears to be common ground that there are only two separate legal entities: Innopac Inc. ("Innopac") and Progressive Packaging Limited ("Progressive"). "Purity Packaging" and "Condor Laminations" are names under which Innopac carries on certain aspects or divisions of its business. The respondents concede that they carry on associated or related activities or businesses under common and control in circumstances under which it would not be inappropriate for the Board to declare that they constituted a single employer for the purpose of the *Labour Relations Act* and that this would result in Progressive becoming bound by the terms of the applicant's most recent collective agreement with Innopac. That agreement, they say, only covers employees in the Condor Laminations division in the Municipality of Metropolitan Toronto. Accordingly, they say, the declarations which they concede may be given would not and should not result in the applicant's having bargaining rights for employees of Progressive in Aurora, Ontario, which lies outside the Municipality of Metropolitan Toronto.

2. It is common ground that certain work formerly performed by employees of Innopac in its Condor Laminations plant in Metropolitan Toronto are now being performed in Aurora, Ontario by employees of Progressive. This fact, and the circumstances of the transfer, are the subject of the trade union's section 89 complaint in Board File 0240-89-U, as is an allegation that the respondent Progressive has discriminated against its members by refusing to entertain their applications for employment in new positions created at the Progressive plant. The respondents deny that they have breached the *Labour Relations Act* in any way.

3. The application and complaint were scheduled for a single day of hearing on May 30, 1989. The parties spent the morning in settlement discussions which did not bear fruit. When they attended before this panel in the afternoon, they advised us that the hearing of the application and complaint on their merits would occupy at least six days of hearing. As it appeared that proceedings of that duration would be completed more quickly if scheduled before a differently constituted panel, we determined not to take any step ourselves which would be inconsistent with another panels' taking charge of the hearing of the matter on the merits.

4. Counsel for the respondent asked us to rule on two matters which he described as preliminary. With respect to the application under subsection 1(4) of the Act, he wanted us to rule that the relief which the respondents had conceded could be granted was the only relief which the Board would grant in that application. The object of such a ruling would be to deny in advance a claim which he understood the applicant would be making in the subsection 1(4) application for a remedy which would extend the geographic scope of the applicant's bargaining rights so as to include Progressive's plant in Aurora. With respect to the section 89 complaint, counsel wished us to consider whether, as he would argue, the hearing of that complaint should be deferred pending the arbitration of certain grievances which the trade union has filed under its collective agreement with Innopac concerning the transfer of work from the Condor plant to the Progressive plant and the resulting of lay-offs of workers at the Condor plant. Counsel for the trade union confirmed that he would, indeed, be seeking extension of the geographic scope of the trade union's bargaining rights as a remedy in either or both of the application and complaint and would resist the suggestion that the matters to be dealt with by the Board in these proceedings should be limited in advance. Counsel agreed that their argument with respect to the matters raised by counsel for the respondent would occupy an hour or two of hearing time.

5. Applications and complaints to the Board can and often do raise a number of issues of both fact and law. In accordance with the conventional approach to adjudication, the Board ordinarily hears the parties' argument with respect to these issues of fact and law only after having heard all the evidence which any of them wishes to put before it with respect to disputed issues of fact. Sometimes it is suggested that it would be desirable to consider some issue in advance because a particular disposition of that issue would make lengthy hearings with respect to other issues unnecessary. This often involves the Boards' having to say what it might do if a set of alleged facts were true, even though it is generally preferable that legal questions be answered only with respect to facts found to be true. Apart from its involving the Board in answering abstract questions which might best be left unanswered, the division of any dispute into a series of so-called "preliminary" issues for consecutive determination can also make the hearing of the matter longer and more complicated than it would have been had the Board simply proceeded in the ordinary way. It is in the nature of many so-called "preliminary" issues that if they are not dispositive when a particular set of facts are assumed to be true they will be argued again, often at even greater length, after there has been an attempt to prove the assumed facts.

6. In the absence of a statutory requirement that it do so, the Board is not obliged to deal in a "preliminary" manner with any issue between parties before it, nor is it obliged to answer legal questions on assumptions about disputed facts before determining whether the facts are true. Whether the Board chooses to entertain any issue in a preliminary way is a matter which involves discretion and judgement, the exercise of which can substantially affect the course which the proceedings may take thereafter. So far as is possible, it is desirable that decisions about so-called "preliminary" issues, including decisions about whether to entertain the issues in a preliminary way, be made by the panel which would otherwise hear the application or complaint on its merits and which, accordingly, would have to hear the matter subject to the constraints and complications which might flow from the Board's having preliminarily entertained and (perhaps) pronounced upon an issue which did not prove dispositive.

7. As this panel will not be hearing this application and complaint on their merits, we concluded that we would not entertain the respondent's "preliminary" arguments, but would simply adjourn the matter to dates to be fixed by the Registrar for hearing of these matters on the merits. The proposition that these issues should be dealt with in a preliminary way may be raised before the panel by which this application and complaint will otherwise be heard on its merits. That panel will be free to entertain them or not and dispose of them as it sees fit.

2636-87-R International Brotherhood of Electrical Workers, Local 594, Applicant v. International Brotherhood of Electrical Workers, Local 586, and Ken J. Woods, Respondents v. **J.S.H. Mueller Ltd.**, Electrical Trade Bargaining Agency and Electrical Contractors Association of Ontario, Interveners

Union Successor Status - International union merging two locals - Board making declaration of successor union for all sectors of the construction industry

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *J. A. Ronson* and *A. HersHKovitz*.

APPEARANCES: *Anthony M. Butler* for the applicant; *Chris G. Paliare* and *Ken Woods* for the respondent; no one appearing for the intervener, *J.S.H. Mueller Ltd.*; *S.C. Bernardo* and *Eryl Roberts* for the interveners, Electrical Trade Bargaining Agency and Electrical Contractors Association of Ontario.

DECISION OF BOARD MEMBER A. HERSHKOVITZ; September 15, 1988

1. This is an application filed pursuant to section 62 of the *Labour Relations Act*.
2. The issue involved is that the parent International Union is asking, pursuant to section 62 of the *Labour Relations Act*, that the applicant, Local 594 be merged with Local 586.
3. The applicant states in Appendix No. 8.9 reasons for declining to effectuate this merger. The reasons set forward by Local 594 deal previously with the function and article of this Local since its revitalization as Local 594 of the International.
4. During the hearing, evidence was presented by counsels, both for the applicant and respondent dealing with the question as to the rights of the applicant to refuse to effectuate a merger with Local 586.
5. Counsel for the respondent argued that under the constitution of the International Brotherhood of Electrical Workers, ("International") the President of the International has been granted the authority, by convention, to order and carry out such merger when it is deemed necessary.
6. Counsel for Local 586 and the International presented the International constitution as the basis for the action being taken. The attention of the Board was directed to some of the clauses in the constitution relating to the duties and responsibilities of membership in the I.B.E.W. Article 22, section 4, states:

Each applicant admitted, shall, in the presence of members of I.B.E.W., ... promises and agree to conform to and abide by the constitution and laws of the I.B.E.W. and its local unions. I will further the purposes for which the I.B.E.W. is instituted. I will bear true allegiance to it and will not sacrifice its interest in any manner.

7. Article 15, section 3, of the International constitution states:

The International President has the right and the power to merge or amalgamate Local Unions in any community or section where the facts development or conditions (in the judgement of the International President) warrants such action, also to decide the terms of or details of any merger or amalgamations when the Local Unions involved cannot or do not agree.

8. The constitution was adopted at the St. Louis convention November 1891 and amended at subsequent conventions right up to 1986 at a convention in Toronto, Ontario.

9. Exhibits of correspondence between Maurice J. Walsh and J.J. Barry International President were presented.

10. In a letter dated January 12, 1986 from Maurice J. Walsh to J.J. Barry, the said Mr. Walsh gives a history of Local 594 since a Charter was granted in 1978. In the statement Mr. Walsh points out that prior to the granting of the said Charter, he and members of present Local 594 were members of Local 172 and a merger took place with Local 586. He goes on to list his grievances with Local 586 and acknowledges the establishment of Local 594.

11. In response to Mr. Walsh's letter, Mr. J.J. Barry, International President in a letter dated December 18, 1986, states in paragraph 3:

In the early part of 1983, a proposed amalgamation of Local 594 into Local 586 Ottawa was under consideration. However, in accordance with the recommendation of International Vice-President Rose and in the light of certain commitments received from officers and members of the Local Union to take positive steps, it was decided to set aside for a period of one year any consideration of removing the I.B.E.W. charter from Pembroke. Whether the Local Union would remain in operation thereafter was dependent upon its ability to operate efficiently and carry out its responsibilities under the I.B.E.W. constitution.

12. This type of correspondence between the parties continued until, in a letter dated October 23, 1987, Mr. J.J. Barry, invoked Article 15, section 3 and as quoted in paragraph 3 of his letter to Ken Woods, International Vice-President of I.B.E.W., (tab 16).

13. Counsel for the applicant took the position that in the first instance the International is not entitled to effect a merger unless a vote is held among the members of Local 594. He challenges the authority of the President to effect a merger even though provided by the constitution of the I.B.E.W. He further challenges the constitution by inferring that the power vested in the International President was not arrived at by the convention of the International.

14. The Local 594 constitution was submitted in evidence and it is important to note that Article, section 1, states:

This organization shall be known as Local 594 of the I.B.E.W. Pembroke Ontario. Local 594 shall have jurisdiction over all inside and outside as defined in article XXVIII, sections 4 and 5 of the I.B.E.W. Constitution performed in the county of Renfrew in the Province of Ontario.

However, the right of the International office to change this jurisdiction is recognized as provided in the I.B.E.W. constitution. Article XXII deals with admission of members. Section 1 - Qualification and admission of members shall be in accordance with Article 21 and 22 of the I.B.E.W. Constitution. Article 22, section 4 reads:

I in the presence of members of the I.B.E.W. promise and agree to conform to and abide by the constitution and laws of the I.B.E.W. and its local unions. I will further the purpose of for which the I.B.E.W. is constituted. I will bear true allegiance to it and will not sacrifice its intent in any manner.

15. Finally, he relies on 62(1) of the *Labour Relations Act* where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union.....the Board in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor "has, or has not, as the case may be, acquired the

rights, privileges and duties under this Act of its predecessor or the Board *may dismiss the application*.

16. On careful reading of the paragraph commencing with “the Board” and ending “...may dismiss the application”, one is obliged to assume that there is an obligation placed upon the Board to discretionary in arriving in a decision.

17. Both counsel for the applicant and the respondent cited and referred to past decisions handed down by the Board.

18. A number of cases were cited by both counsels in support of their respected positions counsel for the applicant referred to case number 2631-83-R in support of his request for holding a vote among members of Local 594. However, we must point out that this case did not deal with two Locals of the same International Union but two Locals of different unions. This case dealt with an application by *U.F.C.W. and L.M.L. Foods Inc. v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees*. In case 0490-77-R, *Retail Clerks International and Zehrs Market* before Vice-Chair, Ian Springate, he makes note in paragraph 12, page 640 and refers to a decision of the Ontario Court of Appeal in *Astgen v Smith* [1969] D.L.R. (3rd) 657.

We recognize that at one time the Board refused to recognize one merger, amalgamation or transfer unless it had been approved by a majority of employees in the affected bargaining unit. However, since the decision of the Ontario Court of Appeal in *Astgen v. Smith, supra*, the Board has instead required only assurance that either the constitutional provisions of the predecessor trade union regarding, a merger, amalgamation or transfer or jurisdiction have been followed.

19. In File No. 0909-81-R before Kevin Burkett, Alternate Chair, that panel concluded and relied on the decision of the Ontario Court of Appeal in *Astgen v. Smith*. Since that decision has already been quoted it is not necessary to quote once more.

20. The cases quoted underlies the premise that Section 62(1) is discretionary and does not bind the Board to one hard and fast position but gives the panel sufficient scope to deal with the issue faced, based on facts presented.

21. Finally, both parties by virtue of accepting the International Constitution and Local 594 constituted have obligated themselves to abide by those constitutions.

22. For all of the above reasons, I am of the opinion that the application should be dismissed. And I declare the successor respondent Local 586 has acquired the rights, privileges and duties under this Act of its predecessor.

DECISION OF BOARD MEMBER JAMES A. RONSON; September 15, 1988

1. I have had the opportunity to read the decisions of my colleagues. I concur with the opinions of Board Member Hershkovitz. I order that the application of the International Brotherhood of Electrical Workers, Local 594 be dismissed, and pursuant to section 62(1) of the *Labour Relations Act* (“the Act”), I declare that the International Brotherhood of Electrical Workers, Local 586 has acquired the rights, privileges and duties of Local 594 under the Act.

2. In an earlier decision my colleagues and I unanimously found that the preconditions in the International constitution had been satisfied and that Local 594 had been merged into Local 586. It then remained whether the Board was satisfied that a declaration under section 62(1) of the

Act should issue. Board Member Hershkovitz and I are satisfied that the declaration should issue for all sectors of the construction industry.

3. For my part, I feel the reasoning expressed in *Trans Nations Incorporated (DBA King Edward Hotel)*, [1981] OLRB Rep. Sept. 1298 applies:

"On the fact of its Constitution, Local 254 was affiliated with the International. Indeed, it was subordinate to the International in the sense that its by-laws were subject to the approval of the International and its jurisdiction is that as "may be allocated to it by the General President of the International Union." A person who becomes a member of Local 254 is required to also become a member of the International and, more importantly, under the terms of Article 3, Section 1 of the Local 254 Constitution its members "agree to abide by ... the Ritual and Constitution of the Hotel and Restaurant Employees and Bartenders' International Union, as now in effect or that may hereafter be amended." Section 16 of the International Constitution sets out the preconditions which must be satisfied to effect a lawful merger of local unions. Given the nature of the relationship between the two organizations, the requirement for all members of the Local to be members of the International, and the agreement of the members of the Local to abide by the Constitution of the International, we can come to no other conclusion but that the members of Local 254 had agreed, one to the other, to be governed by the provisions of Section 16 of the International Constitution in respect of mergers."

DECISION OF VICE-CHAIR MICHAEL BENDEL; September 15, 1988

1. This is an application under section 62 of the *Labour Relations Act*, in which the applicant seeks a declaration that the respondent, Local 586, has not acquired the applicant's rights, privileges and duties under the Act by reason of a merger, amalgamation or transfer or jurisdiction. Section 62 of the Act reads as follows:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

2. The Board rendered an interim decision in relation to this application on May 26, 1988, In paragraphs 2 to 6 of the interim decision, the Board explained the nature of these proceedings as follows:

2. The applicant ("Local 594") has been a construction local of the International Brotherhood of Electrical Workers ("IBEW") in the County of Renfrew, based in Pembroke, since 1978. Its Bylaws, approved in accordance with the IBEW Constitution, have recognized this jurisdiction within the IBEW, and Local 594 is referred to in the provincial agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors' Association of Ontario, on the one hand, and the IBEW and the IBEW Construction Council of Ontario, on the other, as an affiliated Local Union, with its geographic jurisdiction being the County of Renfrew.

3. The International President of the IBEW, claiming to act in pursuance of the IBEW Constitution, decided that, effective January 1, 1988, Local 594 would be merged or amalgamated with

the respondent ("Local 586"), which is an Ottawa-based local. The reasons for the International President's decision are of little or no relevance from the perspective of the disposition of this application. It should perhaps be mentioned, however, that Local 594 was the smallest construction local of the IBEW in Ontario, with some 60 members, and that, in the opinion of the International President, it was not a viable local. The officers of Local 594 have been opposed to this decision, which would have the effect of terminating the existence of Local 594. The members of Local 594 were consulted by the Local's leadership and they too were opposed to their Local being merged with Local 586. The officers of Local 594 have been refusing to co-operate with the implementation of the merger decision. One of the forms taken by this lack of co-operation was a January 1988 application by Local 594 in the District Court of Ontario for an injunction to prevent Local 586 gaining control of bank accounts in the name of Local 594. The injunction was not granted. Local 594 has applied to the Board for a declaration under section 62 of the Act, asking the Board to declare that Local 586 is not its "successor". The declaration is sought in respect of Local 594's rights, privileges and duties as an affiliated Local Union under the provincial agreement.

4. Local 586 opposes Local 594's application and asks the Board to issue a declaration that it is the successor to Local 594.

5. Ken Woods is the International Vice President, First District, of the IBEW. The First District within the IBEW is Canada. Mr. Woods was the IBEW officer who had responsibility delegated to him by the International President to oversee and implement the merger or amalgamation decision. For that reason, he was named as a respondent in the application. In our view, he is not a proper party to these proceedings, and the application is hereby dismissed as against Mr. Woods.

6. The intervener [J.S.H. Mueller Ltd.] is an electrical contractor in Renfrew County, which supports the position taken by Local 594.

3. In the interim decision, the Board recorded its conclusion that the applicant had been merged or amalgamated with the respondent union in accordance with the Constitution of the IBEW. The applicant had argued at the hearing that, even if the Board were to come to that conclusion, no declaration should issue under section 62 as employees for whom it was the bargaining agent had not approved of the respondent union being vested with any bargaining rights in respect of themselves. This issue was thoroughly argued at the hearing. However, in its interim decision, the Board did not deal with the argument. Its reason for not doing so was that it had not received any submissions on whether the scheme of province-wide bargaining in the ICI sector of the construction industry and, in particular, section 137(2) of the Act had any bearing on the circumstances in which a declaration under section 62 might be issued. It decided that a further hearing should be held in order to give the parties an opportunity to make representations on the effect, if any, of section 137(2) of the Act on this application. Section 137(2) reads as follows:

137.-(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

4. At the second hearing, all counsel were in agreement that section 137(2) did not affect the availability of a declaration under section 62 or the circumstances in which a declaration would issue. Counsel also advised the Board that, contrary to what the Board had assumed in its interim decision, the applicant's bargaining rights were not limited to the ICI sector of the construction industry and were not even limited to the construction industry. Specifically, it was pointed out to us that, while the only collective agreement to which Local 594 was a party was the provincial

agreement, this agreement was not limited to the ICI sector, but made express provision for Residential Work (in Section 15) and for Maintenance Work (in Section 16).

5. According to the evidence the Board heard, the members of the applicant, Local 594, were solidly opposed to the merger or amalgamation. It was argued on behalf of Local 594 and the intervener, J.S.H. Mueller Ltd., that the Board's case-law established the principle that no declaration would be issued under section 62 unless the Board were satisfied that the employees in respect of whom bargaining rights were to be transferred had consented to the transfer. Counsel for Local 586 denied that any such precondition existed to the issuance of a declaration under section 62.

6. As I read the cases referred to us by counsel for the parties, the Board has not clearly committed itself to any particular stance as to the need for employee approval of successorship before a declaration will be made. The decided cases reveal at least two distinct approaches.

7. On the one hand, it has been held that the Board's role, under section 62, is strictly declaratory. Its inquiry should be limited to examining whether, as claimed, a merger, amalgamation or transfer of jurisdiction has occurred. The transaction could be pursuant to constitutional provisions, or, in the absence of applicable constitutional provisions, in accordance with the common law requirement of unanimous consent. The Board should make a declaration or dismiss the application on the basis of its finding. This approach is endorsed in the decision in *Zehrs Markets Division of Zehrmart Limited*, [1977] OLRB Rep. Oct. 637 (at page 640):

We recognize that at one time the Board refused to recognize any merger, amalgamation or transfer of jurisdiction unless it had been approved by a majority of employees in the affected bargaining unit. (See, for example, *The Hyrdo-Electric Commission of the City of Hamilton*, 63 C.L.L.C. Para. 16,261). However, since the decision of the Ontario Court of Appeal in *Astgen v. Smith* (1969) 7 D.L.R. (3rd) 657, the Board has instead required only assurance that either the constitutional provisions of the predecessor trade union regarding a merger, amalgamation or transfer of jurisdiction have been followed (*Navco Food Services Limited* [1971] OLRB Rep. Feb. 80) or, if there are no such constitutional provisions, that there has been unanimous approval of the change by the union membership (*Redi Steel Products Ltd.* [1970] OLRB Rep. Nov. 857).

See also *Trans Nations Incorporated*, [1981] OLRB Rep. Sept. 1298.

8. On the other hand, it has been suggested that bargaining rights are not *choses in action* that can be freely assigned between unions. Rather they are "personal" to the bargaining agent. In order for bargaining rights to be assigned from one union to another, the Board must be satisfied, firstly, that there has been an effective merger, amalgamation or transfer of jurisdiction between the two unions, and, secondly, that the assignment has been approved by the employees concerned. This second requirement is designed to reflect the Act's purpose, as stated in the preamble, which is to "[encourage] the practice and procedure of collective bargaining between employers and trade unions as the *freely designated representatives of employees*" (emphasis added). According to this approach, then, the Board's function, in relation to applications under section 62, is not a strictly declaratory one, but is designed to ensure that the labour relations policies reflected in the legislation are complied with. This approach to section 62 is explained at length in *obiter dicta* in *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252. In that same case, the Board doubted that it had ever made a declaration under section 62 without reference to the employees' wishes.

9. A third approach is discernible. The Board, according to this approach, in addition to satisfying itself that the transaction between the unions has been an effective one (according to

constitutional or common law requirements), will pay particular attention to whether the members of the predecessor union had adequate notice of the meeting at which the decision to approve the transaction was taken: *Zehrmart (supra)*, and *Children's Aid Society of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 24.

10. It was suggested in the course of argument that, in all of the decided cases, the result would have been the same regardless which of these approaches the Board had said it was endorsing. This was because employees were actually consulted, and gave their approval to the transaction, in all of the cases where a declaration was granted. And in the few cases where there was no employee approval, there existed other grounds for dismissing the application. In the present case, however, there was no employee approval, and there exists no basis for dismissing the application other than failure to obtain the approval of the employees.

11. In my view, the reason for the different approaches to section 62 can be found within the section itself. On the one hand, subsection 1 empowers the Board to make a "declaration" that the successor "has...acquired the rights, privileges and duties under this Act of its predecessor". This language suggests, as does subsection 3, that the function of the Board is strictly a declaratory one, whereby, in the interests of dispelling doubts, the Board declares whether or not there has been a transfer of bargaining rights by reason of a merger, amalgamation or transfer of jurisdiction, as claimed by a "successor" union. On the other hand, it has been held that (apart from section 62) the rights, privileges and duties of a union under the Act are not transferable, with the result that, when a union merges or amalgamates or transfers its jurisdiction, its bargaining rights are lost. As the Board explained in *L.M.L. Foods Inc. (supra)*, at page 1266:

If a trade union ceases to exist, its bargaining rights and any collective agreement to which it is a party will also cease to exist: *Board of Light and Heat Commissioners of Guelph*, 52 CLLC ¶17,024 *Glass Guild Limited*, 53 CLLC ¶17,057. Prior to the enactment in 1956 of the first of the predecessors of section 62 of the *Labour Relations Act*, the same principle applied when a trade union lost or changed its identity in the process of a merger or transfer of jurisdiction: *Deloro Smelting and Refining Company Limited*, 56 CLLC ¶18,037;...

The purpose of section 62, according to this view, is nothing less than the transferring of bargaining rights. Once that is accepted, a declaration under section 62 cannot be viewed as simply an endorsement by the Board of internal union decisions; its effect is akin to a certification. In these circumstances, it is logical for the Board to want to satisfy itself that a new bargaining agent is not being forced on unwilling employees.

12. The view I take of section 62 is in line with that expressed in *L.M.L. Foods Inc. (supra)*. What is involved in a declaration under section 62 is the transfer of bargaining rights by the Board from one union to another, rather than a recognition by the Board that the predecessor union has transferred the rights to the successor. In these circumstances, the Board is entitled and bound to satisfy itself that the transfer sought is in accordance with other policies of the Act. I have concluded that (except for the ICI sector of the construction industry, which will be discussed later in this decision) the Board should not issue a declaration under section 62 unless it is satisfied that the employees affected approve of the change in their bargaining agent. In my view, it would be contrary to fundamental premises of the legislation for the Board to decide that, as a result of dealings between two unions, employees are to be saddled with a bargaining agent of which the majority of them do not approve. One of the fundamental and pervasive principles of the Act is that a union requires the support of a majority of the employees in each bargaining unit it seeks to represent in order to become the bargaining agent, and that, in the final analysis, it needs to retain that support in order to remain the bargaining agent. This principle underlies the provisions on the certification of bargaining agents, as well as the provisions on the termination of bargaining rights.

The preamble to the Act proclaims that the purpose of the Act is to "[encourage] the practice and procedure of collective bargaining between employers and trade unions as the *freely designated representatives of employees*". It would simply not be consistent with this basic principle for the Board to effect a transfer of bargaining rights from one union to another without the consent of a majority of the employees affected.

13. At a textual level, too, the Act reveals, in my view, that it was not intended that bargaining rights should be transferred under section 62 without regard for the wishes of employees. I refer here to section 62(2) of the Act, which empowers the Board, among other things, to hold "representation votes" before issuing a declaration. This provision substantially confirms that the section is not merely a declaratory one. If the legislator had intended that the Board, under section 62, simply rubber-stamp mergers, amalgamations or transfers of jurisdiction that had been carried out in accordance with union constitutions, it would scarcely have been pertinent to empower the Board to hold representation votes.

14. It could be contended that, whatever might be the need for employee support in other cases, the present case is different in that the employees, through their adherence to the IBEW Constitution, must be deemed to have accepted in advance any decisions concerning the merger or amalgamation of IBEW locals that might be taken in accordance with the Constitution. The fallacy in that approach, in my view, is apparent from the *dicta* of the Board in *L.M.L. Foods Inc.*, where the Board drew attention to the distinction between the trade union as an institution and the trade union as a bargaining agent. This is what the Board said (at pages 1265-1266):

Trade unions which are employer dominated, or which engage in discrimination on prohibited grounds, cannot acquire or assert bargaining rights which will be recognized under the Act (see sections 13 and 48). Beyond that restraint and the implied requirement that it have a constitution, officers and employee "members", the *Labour Relations Act* does not prescribe or regulate the form of a trade union's internal organization, or the content of its constitution. For historical and practical reasons, typical trade union constitutions provide for what they would describe as a "democratic" structure, in which members have some say both in the selection of those who act on its behalf and in the decisions and actions ultimately taken. "Democratic" structure is not, however, a requirement of the *Labour Relations Act*: see *C.S.A.O. National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.*, [1972] 2 O.R. 498; (1972) 26 D.L.R. (3d) 63 (Ont. C.A.); and, *Canada Trust Mortgage Company*, [1976] OLRB Rep. Oct. 596 at paragraph 15. With certain limited exceptions (the requirements of sections 82, 84, 85 and 86, for example) the Act does not provide for supervision of the relationship between a trade union and its members as such or, more accurately, of "the complex of contracts between each member and every other member of the union." The focus of the Act is on the trade union's entitlement to represent employees in a bargaining unit or units and on the trade union's activities in that representative role. Of course, at least some of the employees in a bargaining unit will ordinarily be or have been members of the trade union which represents them. Some of the members of a trade union will ordinarily be or have been employees in a bargaining unit the union is or was entitled to represent. In the case of a trade union which represents only a single unit of employees of one employer, its members and the employees in the bargaining unit it represents may be all or nearly all the same people. Nothing in the *Labour Relations Act* requires or anticipates that result, however; that is why it is important in analyzing the Act to bear in mind that its primary focus is on the trade union in its character as an agent of bargaining unit employees, rather than on its internal structure and the inter-relationships of its members.

The Board's concern, on applications under section 62, is both with unions as institutions and with unions as bargaining agents. For the purpose of deciding whether a merger or amalgamation has occurred, the Board must have regard for the internal dealings of the unions. But, for the purpose of deciding whether, in any case where there has been a merger or amalgamation, a declaration should issue, the union's constitution loses its relevance and the Board must approach the question from the perspective of the majoritarian principles in the Act. It is thus the standards of the Act

that must prevail in determining whether there exists employee approval for the transfer of bargaining rights, rather than some notion of “deemed approval” that could be derived from the union’s constitution.

15. It was noted earlier in this decision that Local 594 is an “affiliated bargaining agent” for the purposes of the part of the Act that deals with province-wide bargaining in the ICI sector of the construction industry. None of the parties made an argument based on section 137(2) of the Act, despite the invitation in our interim decision that they do so. Nevertheless, the Board is of the view that section 137(2) of the Act is of relevance to this application.

16. Section 137(2) was quoted earlier in this decision. Employers represented by a designated or accredited employer bargaining agency are deemed by this provision to have recognized all affiliated bargaining agents represented by a designated or certified employee bargaining agency as the bargaining agents in their respective geographic jurisdictions. In my view, it is implicit in section 137(2) that the power to decide the geographic jurisdiction of each affiliated bargaining agent resides within the employee bargaining agency. This implicit power is reflected in the order designating the employee bargaining agency for electricians and linemen (dated December 12, 1977), which reads, in part, as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario as the employee bargaining agency to represent in bargaining in the industrial, commercial and institutional sector of the construction industry all Journeymen and Apprentice Electricians and Journeymen and Apprentice Linemen, represented by the International Brotherhood of Electrical Workers or locals 105, 115, 120, 303, 339, 353, 530, 586, 773, 804, 894, 1687 or 1739 of the International Brotherhood of Electrical Workers, or any other local of the International Brotherhood of Electrical Workers that might be chartered to represent Electricians or Linemen in the industrial, commercial and institutional sector of the construction industry.

[emphasis added]

It is also reflected in clause 202 of the provincial agreement:

202 GEOGRAPHIC JURISDICTION

It is understood that the geographic jurisdiction of each Local Union is not subject to negotiation, but is established solely within the IBEW.

Accordingly, when the IBEW decided in accordance with its constitution that the geographic jurisdiction of Local 586 should include the County of Renfrew, Local 586 became the affiliated bargaining agent for the County of Renfrew. By virtue of section 137(2), all employers to which the section applied were deemed to have recognized Local 586 as the affiliated bargaining agent in the geographic jurisdiction of the County of Renfrew.

17. The effect of section 137(2), therefore, is to transfer bargaining rights between affiliated bargaining agents when there is a change in their geographic jurisdictions. Accordingly, without Board intervention, by operation of law, employers represented by the Electrical Trade Bargaining Agency are deemed to have recognized Local 586 as the affiliated bargaining agent for the County of Renfrew. Section 137(2) thus constitutes an exception to the general rule, stated earlier in this decision, to the effect that it requires a declaration under section 62 for there to be a transfer of bargaining rights between unions.

18. If the Board were to decide that employee support were necessary for a declaration under section 62 in the case of the ICI sector and if employee support were lacking, the result

would be a contradictory one: employers would have to deal with the alleged successor (by virtue of section 137(2)), but there would be no confirmation of this in the form of a declaration under section 62. The result would be even more contradictory if the Board were to make a declaration under section 62 that bargaining rights had not been acquired by the successor union (as we have been asked to do in this case).

19. I would note in passing that section 138 of the Act, which provides for the provisions dealing with province-wide bargaining to prevail over other provisions, makes no mention of conflict between section 62 and section 137(2). Section 138 is as follows:

138.-(1) Where there is conflict between any provision in sections 139 to 151 and any provision in sections 5 to 57 and 62 to 136, the provisions in sections 139 to 151 prevail.

20. I am of the opinion that, in order to avoid the contradictory results described above, a declaration should issue under section 62 of the Act even in the absence of employee approval, where, by virtue of section 137(2), there has been a deemed recognition of a change of jurisdiction between affiliated bargaining agents. This result might seem to fly in the face of the analysis earlier in this decision about the need for employee approval prior to the issuance of a declaration under section 62. However, as I understand the provisions relating to province-wide bargaining in the ICI sector, the Act itself, rather than the Board, effects the transfer of bargaining rights between affiliated bargaining agents. If the Act provides for the transfer of bargaining rights between unions without the need for employee approval, the Board has no alternative but to respect this. But that is no reason for the Board to relax the requirement for employee support for the transfer of bargaining rights in all the industries or sectors not subject to province-wide bargaining. The tail should not wag the dog.

21. In the result, therefore, I would declare that the respondent, Local 586, has acquired the rights, privileges and duties under the Act of its predecessor, Local 594, as regards the ICI sector of the construction industry.

22. As regards the rights, privileges and duties of Local 594 under the Act in respect of other employees, I would have ordered a representation vote.

**3202-88-R Labourers International Union of North America, Local 183, Applicant
v. Keith Holdsworth Consulting Ltd., Respondent**

Bargaining Unit - Certification - Construction Industry - Employer - Employer arguing an "all employee" unit was appropriate because it engaged in both construction and non-construction work with the same work force - Board holding that where a person operates a business in the construction industry a union is entitled to be certified pursuant to the construction industry provisions of the Act for the employees engaged in the construction part of the business - Employer's construction and non-construction activities not inextricably tied - Appropriate unit one consisting of construction labourers - Employer engaged in the restoration of the waterproofing capabilities of underground garages - Work considered to be repair and not maintenance - Work falling within the construction industry

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *S. B. D. Wahl, A. Dionisio* and *L. D'Agostini* for the applicant; *Peter Chauvin* and *Keith Holdsworth* for the respondent.

DECISION OF THE BOARD; June 13, 1989

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act* ("the Act"). In its application, the applicant, (hereinafter referred to as Labourers Local 183) seeks to acquire bargaining rights for, what may be described in short form, as its "standard" construction industry bargaining unit in applications filed pursuant to section 144(1) of the Act. In this application, that bargaining unit consists of all construction labourers in the employ of the respondent:

- (a) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and
- (b) in all other sectors of the construction industry in the Regional Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham (OLRB Geographic Area 8).

save and except non-working foremen and persons above the rank of non-working foreman.

In addition, the Labourers Local 183 seek a clarity note that the the bargaining unit includes all employees engaged in cement finishing, waterproofing and restoration work.

2. In its reply to the application the respondent (hereafter referred to as Keith Holdsworth) states that it

"was not engaged in construction work on the application date. The respondent;s [sic] activities were routine maintenance work. This Application for Certification, filed under the construction provisions of the Act, has no application to the Respondent. The names of the Respondent's employees have been listed on Schedule "A" to assist the Board, without prejudice to the Respondent's position."

The "occupational classification" of the five employees listed on the respondent's Schedule "A" is "Maintenance Worker".

3. When the hearing convened, counsel for Keith Holdsworth stated that Keith Holdsworth did in fact engage in a "small amount of construction work". Counsel emphasized that the vast majority of the respondent's business was not construction work and did not fall within the definition of "construction industry" found in section 1(1)(f) of the Act. Counsel indicated however, that the respondent's Schedule A as filed was in error and acknowledged that in fact four of the five employees listed were employed on new construction sites (the SkyDome and the Signature Inn at Norfinch at Finch Avenues). Counsel asserted that the fifth employee, Alfredo Arellano, was not employed on a new construction site but was engaged in certain maintenance work at an underground garage. He submitted that the work in which Mr. Arellano was engaged at the time was the type of work which was the respondent's usual and principal business and was not work within the construction industry. Counsel asserted that if, in its application, Labourers Local 183 sought to acquire bargaining rights for *all* of the employees, including those employees not engaged in construction, that it would be "improper" to issue a certificate to the applicant.

4. Counsel further submitted that as the work performed by Mr. Arellano was “fundamentally no different” than any other work of the respondent, the Board ought to determine whether that work was construction work or not. Citing *Ethier Sand and Gravel Limited*, [1979] OLRB Rep. Oct. 962 and *Dominion Paving Limited*, [1981] OLRB Rep. Oct. 1370, counsel argued that an all employee unit was the appropriate unit where an employer engages in some “construction” work, and the employees performing that work are integrated or interchangeable with the employees performing work that is “essentially outside” the construction industry. He submitted that, if both construction and non-construction work is done by the same work force, an all-employee, “industrial” bargaining unit is the appropriate unit.

5. Counsel for the Labourers Local 183 submitted that all of the work performed by all of the employees fell within the “construction industry” as defined in the Act. Counsel also submitted that if part of the employer’s business fell within the construction industry, Labourers Local 183 was entitled to be certified for that part of the business. He further submitted that *Ethier Sand and Gravel Limited* and *Dominion Paving Limited* were no longer good law and referred to the more recent decision of the Board in *Ridsdale Steel Fabricators Inc.*, [1987] OLRB Rep. April 601.

6. Both counsel indicated they were prepared to call evidence in respect of the issues as to whether or not the nature of the work performed by the respondent fell within the construction industry.

7. We wish to first address the respondent’s submissions that, where an employer carries on both construction and non-construction activities with a single work force, the appropriate bargaining unit is an “all-employee” non-construction type unit and a certificate should be granted under the general provisions of the Act (section 5, 6, and 7) rather than the construction industry provisions. In our view, where a person operates a business in the construction industry, (even if that business is only a small part of the person’s business activities) and the person employs “employees” (within the meaning of section 117(b) of the Act) to perform the work of that construction part of the business, a trade union is entitled to be certified pursuant to the construction industry provisions of the Act for the employees engaged in the construction part of the business. In this regard, we agree with the statements of the Board in *Ridsdale Steel Fabricators*, *supra* at paragraphs 9, 10 and 11.

9. In *Ethier Sand & Gravel Limited*, *supra*, one of the issues before the Board was whether or not the application for certification before the Board was properly brought under the construction industry provisions of the Act. In dealing with that issue, the Board said in part at paragraphs 8 and 9 that:

8. Before an application may be successfully made under the provisions of section 108 of *The Labour Relations Act*, it is necessary for an applicant to establish not only that it is a trade union within the meaning of section 117(f) but also that the employer is an employer within the meaning of section 117(c) and that the employees are employees within the meaning of section 117(b). *With respect to section 117(b), the applicant might well have been able to establish that the employees affected by the application are employees within the meaning of that subsection if it had called any evidence on this point.* Since no evidence was called on this point, the Board is not prepared to find that the employees who are affected by this application are employees within the meaning of section 117(b) of *The Labour Relations Act*.

9. *The respondent performs essentially the work of a supplier of materials to employers who apparently operate businesses in the construction industry. As a secondary feature, the respondent constructs roads from its own materials.* There is no doubt that the construction of roads is included in the

definition of "construction industry" in section 1(1)(f) of *The Labour Relations Act*. The delivery of materials to employers who are engaged in performing work at the site of the construction of roads is not the operation of a business engaged in construction of "works" at the site thereof and does not fall within the definition of "construction industry" within the meaning of section 1(1)(f). See the *Cedarhurst Paving Co. Limited*, case [1964] OLRB Rep. Dec. 442. *The respondent, on the facts before the Board, is engaged in operations which essentially fall outside the definition of "construction industry" in section 1(1)(f) and as a secondary feature is engaged in operations which fall within the definition of "construction industry" within the meaning of section 1(1)(f). Where an employer is engaged in the construction and non-construction activities with the same work force, the Board has held that such mixed activities do not fall within the meaning of "construction industry" in section 1(1)(f) and that such an employer is not an employer as defined in section 117(c) of the Labour Relations Act.* See the *John Harvie Limited* case [1969] OLRB Rep. April 145; and the *Canadian Pittsburgh Industries Limited*, case Board File No. 15984-69-M.

[emphasis added]

In *Ethier Sand & Gravel Limited*, the Board did not have before it an employer that operated a fabricating shop, a mode of operation that is common in the sheet metal business. Further, both of the decisions cited as authority for the proposition that an employer who engaged in construction and non-construction activities with the same work force is not an employer in the construction industry were made prior to the enactment of the *Labour Relations Amendment Act* Statute of Ontario, 1970 (No. 2) c.85, section 39 which introduced what is now clause (c) of section 117 of the Act and defined who is an 'employee' in the construction industry for the first time. Prior to that, as for example in its *John Harvie Limited*, [1969] OLRB Rep. April 145 and *Canadian Pittsburgh Industries Limited*, Board File No. 15984-69-M decisions, the Board had excluded shop, yard, and other off-site employees from bargaining units when considering applications for certification under the construction industry provisions of the Act.

10. Clauses (b) and (c) of section 117 of the *Labour Relations Act* define "employee" and "employer" in the construction industry as follows:

- (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining unit with on-site employees;
- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

Nowhere in the Act is it stipulated that a person must operate a business that is engaged solely or even primarily in the construction industry in order for that person to be an employer in the construction industry. Nor has the Board required that a person's business be operated solely or primarily in the construction industry in order for that person to be an employer in the construction industry (see, *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 and the Board decisions cited therein at paragraph 10). Similarly, there is no requirement that an employee perform a majority or any of his work on a construction site in order to be an employee in the construction industry. It is sufficient for an employee to be "commonly associated in his work or bargaining with on-site employees". Consequently, it is not correct, in our view, to say that an employer engaged in construction and non-construction activities with the same work force cannot be an employer in the construction industry.

11. *Dominion Paving Limited*, *supra*, illustrates the Board's response, where, in an application for certification, the respondent employer carries on both construction and non-construction activities with essentially different work forces. That response, which was underlined in *Metro*

Railing Ltd., *supra*, is to group the employees into separate construction and non-construction bargaining units.

8. We note that in the evidence before us there is simply no evidence to substantiate the respondent's submissions that the portion of its business which is non-construction is inextricably tied to its construction activities so that it would be impracticable, unreasonable or impossible for the respondent to group its employees into separate construction and non-construction bargaining units. In the circumstances of this case we find that this application has been properly brought pursuant to the construction industry provisions of the Act.

9. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

10. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

11. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. Our determination in respect of this matter is sufficient to dispose of this application in view of the respondent's admission at the hearing that four of its employees were in fact employed in the bargaining unit, and were engaged in construction activities on new construction sites on the date of application. We disclosed the count at the hearing and advised the parties that, the Labourers Local 183 had filed membership evidence in respect of four of the five persons listed as employees in Schedule "A". Numerically therefore, the dispute between the parties as to whether Alfredo Arrelano was or was not engaged in the construction industry on the date of application, and whether he was or was not an employee within the bargaining unit sought by Labourers Local 183,

could not affect the applicant's right to be certified. The parties however, led evidence in respect of the respondent's operations in general, and the work performed by the five employees listed on Schedule "A" in particular. The respondent specifically requested the Board to proceed with hearing the evidence as to the work performed by Alfredo Arrelano so that the Board could address the issue as to whether a part of the respondent's business was non-construction. In his final submissions, counsel for the respondent argued that a part of the respondent's business was "maintenance" and not construction, and urged that such a finding "should be reflected in the decision."

13. In view of the evidence and submissions we have heard, we will deal with the matter as to whether part of the respondent's business is non-construction. In so doing, we recognize that our decision in this regard is obiter and not strictly necessary in order to deal with this application (the Board having the authority to issue an interim certificate pursuant to section 6(2) of the Act in circumstances such as these). Indeed, counsel for the respondent indicated that his client did not necessarily consider itself bound by our determination as to whether a portion of its operations were "maintenance" or "repair" and reserved its right to raise that matter again in the future in any other proceedings. Notwithstanding this, we have addressed the issue in the hope that our findings in respect of the respondent's operations will assist the parties in their future dealings without the need for further costly and time-consuming litigation (litigation which also invariably serves as an obstacle to the establishment of harmonious labour relations between the parties).

14. In its reply the respondent describes the general nature of its business as "concrete maintenance". Primarily, its operation involves various pressure grouting processes involving all types of materials. Pressure grouting itself is a process which involves pumping fluid materials into walls, ceilings, floors, etc. After the liquid has been pumped it solidifies thus becoming a "seal". The respondent described the major purpose of its operations was "to seal cracks against the egress of water."

15. The major part of the respondent's operations involves sealing cracks in underground parking garages. The size of the cracks vary and range from one thousandth of an inch to one eighth of an inch. On occasions, the respondent has however dealt with larger cracks. In the evidence before us, the size of the cracks varied from a crack sufficient to let in a "small waterfall" to cracks which let through water "like a steady drip of a bathroom tap". In addition to this work in underground garages, in recent months the respondent has also carried out its operations in places other than underground parking garages, a matter which is addressed in some detail below.

16. Mr. Keith Holdsworth, the owner and President of the respondent testified that it is normal, "almost without exception", for parking garages to spring leaks. In most cases, cracks will develop in the concrete while at other times the water proofing to the joints fails or deteriorates. In most cases the water leakage is due to a deterioration of the structure over time. On occasion leakage may be the result of initial defects in construction. In either event the purpose of the work is to recreate the waterproofing capacity of the structure, or that part of the structure which has lost its capacity to keep out the water.

17. On the date of application two of the employees, David Bindle and John Hainey worked at the Signature Inn Hotel at Norfinch and Finch Avenue. The construction of the walls at that site was hollow concrete block construction with concrete poured into the cavity of the blocks to stabilize the walls. The contractor on site had experienced certain technical problems in pouring the concrete into the basement walls. Having proceeded with the job notwithstanding these difficulties, and having placed the floor on top of these concrete blocks, the contractor called upon the respondent to fill the concrete blocks by pumping a cementitious grout instead of concrete into the cavity of the block. Mr. Holdsworth described that the purpose of this operation was to "stabilize

and strengthen the concrete blocks up to their full function as load bearing walls." Mr. Holdsworth described this operation as being "totally different" from his other operations in parking garages because this work was "structural in nature."

18. On the date of application two other employees, David Hand and David Jennings worked on the steel truss pedestrian bridge crossing the railroad tracks to the Dome Stadium in Toronto. The work at the SkyDome was necessitated because certain work performed by a contractor on the bridge bearing pads was found to be unacceptable by the consulting engineers on site. On that site the respondent's work consisted of pumping an epoxy resin (which has a structural use) to fill small gaps above and below the rubber bridge bearings. Mr. Holdsworth testified that the purpose of the work was "to make sure the bearings would not fail in use." Although Mr. Holdsworth described this work as "a nightmare" when compared to his other operations, this was primarily because of certain scheduling requirements and the stringent requirements of the consulting engineers in respect of the type of material used. He acknowledged that the nature of the work, the actual details of the process, was similar to his other operations although the context was obviously different. He described the purpose of the work performed at the SkyDome Bridge as being different because it involved structural ability while generally the purpose of his operations was "to stop leaks".

19. Only one employee, Mr. Alfredo Arellano was at work at an underground parking garage on the date of application. That garage was situated at 333, Clark Avenue in Thornhill, Ontario. The evidence disclosed however, that Mr. Arellano's job was not limited to merely fixing leaks at that garage. An equal proportion of his time was spent in the repair of an expansion joint situated between two floors of concrete. There was a large gap between the joint and the concrete. Styrofoam SM had been placed in the crack. The respondent removed the styrofoam and pumped grout to fill the crack. The purpose of that grout was not to fuse the concrete but rather to act as a filler, to permanently fill the gap and thereby keep back the water. In addition, the water proofing membrane on the top part of the expansion joint was, and had, gradually deteriorated necessitating work in respect of that water proofing membrane by the respondent.

20. Generally when working in underground garages the work required to be performed is indicated to Mr. Holdsworth by the client who walks around the garage facility with Mr. Holdsworth. During this walk around the client either points out the leaks which need to be fixed, or Mr. Holdsworth will make his own notes. As Mr. Holdsworth testified, the client tells him to "fix that one, fix that one", etc. Although the respondent can often return to the same garage for a successive period of years, this return is necessitated by new leaks or the respondent's own warranty. There is no formalized schedule or system used by the respondent to periodically return to garages. To the contrary, the respondent attends on an "as needed" basis. Generally, the garages remain in use while the respondent is performing the work.

21. The actual work done in underground parking garages involves cleaning the crack, drilling holes (at intervals along the joints) and thereafter pumping material through these holes. The material ultimately solidifies in the cracks thereby sealing the cracks.

22. In addition to his work in underground garages, in the last six months the respondent has (a) worked on cracks in a concrete suspended floor slab at MacMillan Bloedel; (b) worked on cracks at the Bloor Viaduct Bridge (while the bridge was closed and a site described by Mr. Holdsworth as an "actual construction site"); (c) "repaired" cracks in the elevator shaft at the Ottawa Civic Hospital; (d) sealed the Waterproof joints around certain tanks at the Napanee Sewage Treatment Plant; (e) worked on cracks at the Old Mill Bridge in Toronto; (f) worked on cracks in the rough pressure wall in a cement quarry; and (g) performed work in the basement of a Spar

Aerospace storage facility. The work performed and the process used on each of these occasions is similar to the work performed and the process used at underground garages. The purpose for performing the work however was different. For example, in the case of the suspended floor slab at MacMillan Bloedel the client was afraid that the slab would fall and hurt someone and the respondent was retained to "repair that crack". The Bloor Viaduct Bridge job involved the repair of certain expansion joints which were part of the overall restoration of the bridge. The respondent was engaged by the general contractor to fill a void caused by the improper installation of the new concrete. The work at the Old Mill Bridge on the other hand involved a longitudinal crack in the concrete arches which the respondent's employees filled with an epoxy resin. That filling was not structurally necessary but was filled for "cosmetic" reasons. The purpose of the work at the Napanee Sewage Treatment Plant was to "bring the tanks back to standard" and ensure that the gas tanks did not leak.

23. Counsel for the respondent submitted that part of respondent's business was maintenance and not construction. Although he acknowledged that the work performed by Messrs. Bindel, Hainey, Hand and Jennings on the date of application was construction work, he argued that work performed by Alfredo Arellano, and generally the work performed by the respondent in underground parking garages was not construction work. He argued that, like most things, concrete deteriorates after a period of time and therefore requires maintenance to prevent deterioration of the structure. The respondent's work is to seal cracks, prevent them from leaking further, thereby maintaining the facility and thereby preventing damage to the structure. That damage could ultimately require repair. Counsel emphasized that the respondent's work was part of an ongoing process with the respondent's work forces returning to the same garage as many as three or four times a year. He also underscored the fact that the respondent's operations were carried out while the garage was still in operation and functioning.

24. In support of his submissions, counsel cited the decision of the Board in *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477. Counsel argued that the test to determine whether the work was "maintenance" or "repair" should *not* be whether employees use the same tool, exercise the same skills or apply the same process as employees performing that portion of the work which the parties have agreed is clearly within the definition of "construction industry" found in the Act. Counsel stated that the test to be applied was enunciated by the Board in *The Master Insulators'* case where the Board stated at paragraphs 28 and 29":

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was in an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. *The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficulty

[sic] to distinguish from “repair”. In our view, *it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work.* Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. “Maintenance” and “repair” are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

25. Counsel asserted that the Board should look to the purpose of the work performed by the employees. Counsel submitted that concrete requires maintenance as it deteriorates. The purpose of the work performed by the respondent was to prevent further deterioration to the garage structure. The purpose was not to add or subtract work to an existing structure or system. Counsel characterized the respondent’s activities as an ongoing process of the maintenance of the underground garage facility. That maintenance was conducted while the garage was still in operation and is significantly different from the “repair” of a garage facility which is generally performed by a general contractor (who shuts down the garage while performing that work). The thrust of counsel’s submissions were that, unlike the work of a general contractor who “restores” the garage facility to its operational level, the work of the respondent merely assists in preserving the functioning of the garage structure.

26. In addition, counsel referred to the decision of the Board in *The Board of Governors of the University of Western Ontario*, [1970] OLRB Rep. Oct. 776 where at paragraph 4 the Board stated:

4. In order to rectify cracks which appeared on the exteriors of some of its buildings, the respondent hired two stonemasons on a temporary basis to affect this purpose. Although the work may be described as general repairs to the exteriors of certain walls, we are of the opinion that the work performed by the two stonemasons is properly characterized as maintenance work rather than as repairing a building or a structure. We therefore find that the respondent is not a person operating a business in the construction industry as defined in sections 90(a) and 1(1)(da) of the Labour Relations Act and that this is not an application for certification within the meaning of section 92 of the Labour Relations Act.

As this reported decision predates the decision of the Board in the *Master Insulators’*, and is sparse in its recitation of facts relating to the work actually performed or the context in which it was performed, we have found it of little assistance.

27. On the evidence before us we are unable to concur that the work performed by Mr. Arellano was “maintenance” and not “repair”. Although we concur that the work functions performed by employees is neither a determinative factor nor the test employed to distinguish “maintenance” work from “repair”, we find it convenient to use these work functions as a starting point in our analysis. We note that the work functions of the employees (drilling, wire-brushing, trowel work and the operation of a grout pump) are the type of work functions typical of certain persons employed in the construction industry. That however, is not sufficient to make this “repair” or “construction” work rather than maintenance. Similarly, we are not persuaded that merely because these employees perform the exact same work functions and employ the exact same process, regardless of whether they are engaged in the disputed work (parking garages) or in what the parties have agreed is clearly construction work (i.e. work on the Dome, and the Signature Inn site) is determinative of the issue. The context in which the work takes place, the purpose of the work is the demarcation line between maintenance and repair. At times that demarcation line is

bold and readily identifiable. On other occasions, such as the present one, that line is thin and less easily identified.

28. In our view, application of the test enunciated in the *Master Insulators'* case in respect of this purpose and context, namely is the work "... necessary to restore a system or part of a system which has ceased to function or function economically" leads to the conclusion that this work is "repair" and not "maintenance". (See also *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640 at paragraphs 20 and 21). In the case of the work performed by Mr. Arellano on the date of application, fifty percent of that work involved the removal and replacement of an expansion joint and the waterproofing membrane of that joint. That work falls squarely on the "repair" side of the demarcation line between repair and maintenance. In respect of this work we note the decision of the Board in *Quinard Limited*, [1982] OLRB Rep. July 1054 where at paragraph 9 the Board stated:

9. It is the contention of the respondents that the purpose of the work in question is to preserve the functioning of an existing system and hence according to the reasoning of the Board in *Master Insulators Association of Ontario Inc.* [1980] OLRB Rep. Oct. 1477, the work should be regarded as maintenance work. We are unable to accept this contention. To the extent that work is done on existing equipment and piping to keep it functioning properly, we agree that it can properly be classified as maintenance work. However, in the instant case, large pieces of existing equipment are being taken out of the production process and replaced by new equipment. Piping has to be attached to all of the new equipment and a certain amount of additional piping installed. *In our view, the removal of large pieces of equipment forming part of the existing production system, and the installation of new equipment along with the related piping work, goes beyond simple maintenance work and constitutes work which comes within the construction industry.* We are further satisfied that it is work within the ICI sector.

[emphasis added]

29. Similarly, we are of the view that the remaining fifty percent of Mr. Arellano's work at the underground parking garage (work which the respondent characterizes as the typical and major portion of its activities) is work which is also properly characterized as repair or construction and not maintenance. Although that work is much closer to the demarcation line, on balance and after a review of all of the evidence, we find that the work falls within the definition of "construction industry" as found in section 1(1)(f) of the Act. The work of the respondent in underground garages involves restoring the waterproofing capabilities of the structures. The waterproofing capability of the garage has failed and the respondent's job is to recreate or reestablish that waterproofing capacity. To paraphrase the language of the Board in *Master Insulators'*, the respondent is adding the required waterproofing capacity to the concrete structure to enable that structure to function properly. Unlike the case before the Board in *Gallant Painting*, [1987] OLRB Rep. Mar. 367 where the Board concluded that the exterior painting of structures at a petrochemical complex was "maintenance" and not "repair", this is not a case where the respondent applies a sealant, paint or tar to prevent leakage or saturation of water that has not yet occurred. To use the language of the Board in *Gallant Painting, supra*, this is not work "done for the primary purpose of sustaining and protecting operating systems". Rather it is work performed after the system has ceased to function. The "system" in this case is the water proofing capabilities of the concrete structure.

30. We are reinforced in this view by a number of factors. First and foremost is the manner in which the respondent is advised or becomes aware of the work which has to be performed. When the respondent is called in, the garage is already leaking. Water is already coming in through cracks in the concrete. As Mr. Holdsworth himself testified on several occasions, his company is there "to fix the leaks". Although the semantics of the words repair, maintenance, or fix are not in and of themselves conclusive (the words are often although at times erroneously used interchange-

ably), Mr. Holdsworth's use of the word "fix" in this case accurately summarises the nature of the respondent's work. A garage leaks. The leaks are identified and the employees perform the work required to fix or repair the cracks which cause the leaks.

31. Secondly, and as a factor auxiliary to the first, we note that the work of the respondent does not involve a continuous program of routine or regular "maintenance". There is no evidence of regular or routine attendance by the respondent in the parking garages of its customers. Although the respondent may attend at a garage several times a year, this reattendance is necessitated by further problems and/or new leaks. If something breaks down and needs to be fixed, the company reattends. Neither is there any evidence to suggest that the respondent has a system through which regular or routine attention is paid to the parking garage structures or the concrete structures on which it has worked or continues to work. There is no evidence to suggest the continuous, regular or preventative work which goes towards sustaining the concrete structure to avert or preclude deterioration. The respondent does not, for example, have a contract which obliges it to keep the structure free of leaks. Rather, the respondent collects a fee for service. The service is to fix and repair leaks in the structure.

32. For all of these reasons we have concluded that all of the work performed by Mr. Arelano was work within the construction industry.

33. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 12, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

34. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 9 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

35. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1409-88-R International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Applicant v. Levert & Associates Contracting Inc., Respondent

Certification - Construction Industry - Employer - Whether respondent is an employer in the construction industry - Respondent replacing metal plates and pipes in recovery and steam plant at a pulp and paper mill during its annual shutdown - Work found to be maintenance work not repair - Application converted to one under the general provisions of the Act - All employee unit found appropriate - Certificate issuing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *Michael A. Church*, *Edward Power* and *Andy Holder* for the applicant; *K. R. Valin* and *R. Levert* for the respondent.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER W. GIBSON; June 9, 1989

1. In this application for certification made under the construction industry provisions of the *Labour Relations Act*, the applicant is seeking to represent all boilermakers and boilermakers' apprentices, save and except non-working foremen and persons above the rank of non-working foreman in the employ of the respondent in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario and in all other sectors in the District of Cochrane. The respondent claims that it is not an employer in the construction industry and, accordingly, the unit sought by the applicant is not a unit of employees appropriate for collective bargaining. Consistent with that position, the respondent proposes a bargaining unit described in the following terms as a unit which would be appropriate for collective bargaining: all employees of the respondent at Smooth Rock Falls, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and technical employees.

2. The issues raised by the application and reply to it caused the Board, differently constituted, to authorize one of its labour relations officers to inquire and report to the Board respecting:

- (a) whether the Respondent was an Employer in the construction industry during the material times;
- (b) the nature of work performed by the Respondent's employees during the material times; and
- (c) the list and composition of the bargaining unit herein.

The officer has submitted his report to the Board. Copies were served on the parties and, subsequently, the Board held a hearing for purposes of receiving the parties' submissions on the conclusion which the Board should reach about the issues addressed by the inquiry, based on the evidence contained in the report.

3. The respondent had identified three employees whom it believed would be in the bargaining unit proposed by the applicant: Rick Atchinson, Richard Charbonneau and Alain Dubord. The parties later agreed that Dubord "...does not fall within a unit of boilermakers and apprentices for the purposes of this application.". Atchinson and Charbonneau testified at the inquiry, as

did Ed Power, Claude Brunet and Joseph Girardin. Power was called by the applicant to testify and Brunet and Girardin were called by the respondent. Their testimony is set out in the officer's report. The findings of fact set out herein have been made based on the Board's assessment of their evidence and having regard to the parties' submissions thereon.

4. When this application was made, the respondent was performing a contract for certain work at a pulp and paper mill in Smooth Rock Falls operated by Mallette Kraft Pulp and Paper. The mill was shut down for its annual overhaul. The respondent had contracted to affix four steel plates to a dissolving tank in the recovery and steam plant and to replace a pipe which conducts vapour to an evaporator in the recovery and steam plant. Tests carried out by the mill's engineering staff had shown that some areas of the tank and pipe had become thin. The dissolving tank held a liquid referred to as "smelt", a by-product of the steam boiler used to produce green liquor for the pulp and paper making process. The pipe was described as approximately 22 to 24 inches in diameter and eight feet long. It made a horizontal connection between two vertical vent pipes. Both the tank and the pipe had been patched previously by employees of the mill. While they were operating right up to the annual shutdown, Mallette wanted to patch the tank and replace the pipe so as to reduce the risk of their failure while the mill was operating. The mill's engineering staff had decided it would be more economical to replace the eight feet of vapour pipe than to patch or replace weak sections. The Board accepts Girardin's evidence that neither the tank nor the pipe was leaking prior to the shutdown. He is assistant superintendent of the recovery and steam plant and was around the equipment on a daily basis as part of his job.

5. The work on the tank involved welding metal plates to its exterior surface to "re-line" or reinforce areas of the tank which the tests had shown to be thin. This involved approximately one-third to one-half of the tank's surface. The four plates, four by eight feet and a half inch thick, were supplied by the mill to conform to the shape of the tank, but the respondent's employees found it necessary to cut them in half in order to get a satisfactory fit. They also found it necessary to cut out one of the patches on the tank in order to get one of the plates to fit. In order to have working access to the tank's surface, the employees had to remove a permanent catwalk and erect a working scaffold. After the work was finished, the scaffolding was taken down and the catwalk put back in place. There is no evidence that any work was performed on the catwalk, except to remove it and put it back. The surface of the tank where the edges of the plates were to be welded had to be ground to remove scale, or any contaminants. The plates were rigged and hoisted into position, fitted to the tank surface and welded in place.

6. Replacement of the vapour pipe involved cutting out and removing the old pipe section, cutting a pipe flange from it, welding the flange to the replacement pipe, rigging and hoisting the new pipe into place and connecting each end to the vertical pipes. It was bolted at the flange end and welded at the other end.

7. The respondent's employees performed the work on the tank and the vapour pipe using tools, equipment and work methods commonly, although not exclusively, used by the boilermaker trade whether working on site or in a fabricating shop.

8. There was also evidence that the respondent installed a hood or cover over an electric motor in the recovery and steam plant. There had not been one over that motor before. The parties agree, however, that this work was performed after the application date and, therefore, is not relevant to the issues before the Board.

9. A witness for the applicant testified that, in addition to the respondent, there were two boilermaker contractors performing work in the mill during the shutdown. Both were said to have employed members of the applicant under terms of the boilermakers provincial agreement. One

was performing work on a boiler in the recovery and steam plant where the respondent's employees were working. The other was performing work on the bleach washers and a precipitator. The evidence does not reveal the nature of the work being performed by either of them.

10. The parties characterized the main issue before the Board as being whether the work described in paragraphs 5 and 6 is construction work. More precisely, the main issue is whether the respondent is an employer in the construction industry within the meaning of the Act. If it is not, this application could not properly be brought under the construction industry provisions of the Act. Clause (c) of section 117 of the Act defines "employer" as follows:

- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

The term "construction industry" employed in that definition is itself defined in clause (f) of subsection 1(1) of the Act:

- (f) "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

11. The heart of the main issue is whether the work described in the facts set out above is work in the construction industry as it is defined in clause (f) of subsection 1(1). If it is, it is common ground that the respondent is an employer in the construction industry for purposes of the Act. The respondent submits that the work in issue is maintenance work and not construction. The applicant takes the position that it is "repair", as that word is used in the definition of construction industry, and therefore is construction work. Both parties relied in part for designating the work as maintenance or repair on the principles stated in *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477, paragraphs 28 and 29:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. *The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". In our view, *it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work.* Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "re-

pair” are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

Their respective applications of those principles to the facts in this case arrive at opposite conclusions because of their different interpretations of the evidence. That is not surprising since it is almost trite to say that cases of this sort must be decided on their unique fact situations. This is evident from other decisions of the Board on which each party relied and which they submit, correctly, followed the principles enunciated in *Master Insulators*'. In this respect, the applicant referred the Board to *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640 and the respondent referred us to *Gallant Painting*, [1987] OLRB Rep. March 367.

12. The Board has recognized a distinction between maintenance work and construction work since its decision in *Tops Marina Motor Hotel*, 64 CLLC ¶16,004, the first reported decision interpreting the definition of construction industry in what is now clause (f) of subsection 1(1) of the Act, even though the words maintenance or maintaining are not used in the definition or elsewhere in the Act. The problem always is to make the distinction in a particular fact situation because there is no clear demarcation between maintenance work and construction and, in the Board's experience, what the parties see generally as being one or the other appears to be very much in the eye of the beholder. See, for example, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, at paragraphs 46 and 47. The Board, of course, must determine whether or not work characterized by a party as maintenance work is construction work for purposes of the Act, not for some more general purpose. The Board's decision in *Master Insulators*', *supra*, is the first reported decision which lends some definition to the task of distinguishing maintenance work which is not construction work from repair work which is.

13. The facts here are clear. The dissolving tank and the vapour pipe were functioning fully immediately prior to the shutdown. But, because they both had developed thin areas, it was decided, in the case of the tank, to reinforce those areas and, in the case of the pipe, to replace it because that was more economical than patching or cutting out and replacing the thin areas. The work was not an addition to the recovery and steam plant and was not for the purpose of increasing its production capacity. It was work done for the purpose of avoiding having the tank or pipe fail while the mill was operating. Clearly, it was work which would assist in preserving the functioning of the recovery and steam plant and it was not work done for the purpose of restoring a system which had ceased to function or function economically.

14. These facts distinguish this case from *Inscan*, *supra*, on which the applicant relies, where fire damage at a refinery stopped production for three weeks of a feedstock for lubricating oils. That process represented approximately ten per cent of the total product capacity of the refinery. The facts herein are much more analogous to those in *Gallant Painting*, *supra*, on which the respondent relies. In that case the Board found that the painting of "...pipes, tanks and other containers...", amongst other things, in two petrochemical plants, was work which "...will preserve and protect the structures from corrosion and thereby extend their useful lives.". The patching of the tank and replacement of the vapour pipe served to extend the useful life of the recovery systems in the recovery and steam plant of the mill.

15. The fact that there were other contractors in the mill who may have been employing boilermakers pursuant to the boilermakers provincial agreement, an agreement which has application in the industrial, commercial and institutional sector of the construction industry, is of no assistance to the Board in this case. The question the Board must answer is whether the respon-

dent was performing work in the construction industry and was an employer within the meaning of clause (c) of section 117 of the Act. That requires an analysis of the work which the respondent's employees were performing. There is no evidence that the work which they were doing had any connection whatsoever with the work being performed by the other contractors.

16. The Board finds the reasoning in the *Master Insulators'* decision respecting the distinction between maintenance and construction work applicable to the facts of this case and adopts that reasoning. The Board finds, therefore, that the work on which the respondent's employees were engaged on the date of making of this application was not work in the construction industry. Therefore, the respondent is not an employer as defined in clause (c) of section 117 of the Act and this application for certification is not properly made under the construction industry provisions of the Act.

17. In this result, the applicant has requested the Board to process the application pursuant to sections 5, 6 and 7 of the Act. It has been the Board's practice to do so in cases where it has found the application cannot be processed under the construction industry provisions. The respondent did not oppose the request. Accordingly, having regard to the Board's practice, it will treat this as an application made pursuant to section 5 of the Act.

18. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

19. The respondent argued that the applicant was not an appropriate bargaining agent for a unit of the respondent's employees for two reasons. First, because the applicant was unwilling to represent labourers (apparently Dubord). Second, because the applicant did not have an established practice of representing maintenance employees in the pulp and paper industry. Both grounds are wholly irrelevant. The respondent is not an employer in the pulp and paper industry and, with respect to the first ground, the applicant merely took the position that Dubord was not a boilermaker or apprentice boilermaker and, therefore, could not be in a craft unit of boilermakers. The respondent agreed. The applicant is fully prepared to represent employees who would be in an "all employee" unit, and, as a trade union within the meaning of the Act, is entitled to do so if it can demonstrate that it has the requisite number of employees in a unit found by the Board to be appropriate for collective bargaining are its members.

20. The Board finds that all employees of the respondent at Smooth Rock Falls, Ontario, save and except office and sales staff, foremen and persons above the rank of foreman, constitute a unit of the respondent's employees appropriate for collective bargaining.

21. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 3, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J. REDSHAW; June 9, 1989

1. I cannot agree with the majority that the work performed by the employees of Levert & Associates Contracting Inc. was "maintenance" work. In my opinion the work is repair work.

2. The maintenance performed on the system by in plant forces was not adequate enough

to prevent the pipe walls and tank walls from thinning and it was not economical to continue to patch the system. It became necessary to replace the pipe with a new pipe. The foreman who did the work testified that one half of the skin on the tank was replaced with new plates welded over the existing walls. The reflector or hood was completely new construction. There had previously been no protection for the motors. The only evidence regarding the stairs and catwalks was that they had to be dismantled to replace the skin on the tank and were replaced afterwards. No one said that any work had to be performed on the stairs or catwalks themselves.

3. Mr. Claude Brunet, the Maintenance Planner, of Mallette Kraft Pulp and Paper Mill testified that "It's work that we can't do when we're running."

4. Charbonneau testified that the tank walls were so thin that the skin was bulging out in spots and that there were holes the size of a fifty cent piece in places.

5. The *Master Insulators'* case in paragraph 29 states: "Where the work is necessary to restore a system or part of a system which has ceased to function economically such work is repair work. 'Maintenance' and 'repair' are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair."

6. It had become a situation where it was no longer economically feasible to patch the system. It surely was a situation where repair had become inevitable.

7. In my view the work that was performed by the employees in the proposed bargaining unit was repair work and not maintenance

0225-89-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. M.W.M. Construction of Kitchener Limited, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Council of trade unions applying under s.144(1) for certification for unit including ICI sector - Applicant later requesting that its application be amended to one under s.144(3) to exclude the ICI sector - Whether council of trade unions can make an application under s.144(3) - Whether applicant attempting to gerrymander - Applicant allowed to amend its application

BEFORE: R. A. Furness, Vice-Chair, and Board Members D. A. MacDonald and C. A. Ballentine.

APPEARANCES: Jules Bloch, Ernie Barros and Jim Nicolson for the applicant; A. A. Morscher, J. Meyers and A. Muhic for the respondent; Valerie Hoag, Art Hordyk and John Yantha for the objectors.

DECISION OF THE BOARD; June 2, 1989

1. On April 24, 1989, the applicant applied for certification with respect to a bargaining unit of "all construction labourers in the employ of the respondent in the industrial, commercial

and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in Ontario Labour Relations Board Area No. 6, save and except non-working foremen and persons above that rank". In its reply dated May 9, 1989, the respondent indicated that the appropriate bargaining unit was "same as claimed by Applicant in its Application for certification". The hearing in this matter was scheduled for May 30, 1989. In a letter to the Board dated May 24, 1989, which was received by the Board on May 25, 1989, and which was copied to counsel for the respondent and counsel for the objectors, the applicant advised the Board that it wished to recast its application so that the application should read "all construction labourers in the employ of the respondent in all other sectors of the Construction Industry in Ontario Labour Relations Board Area No. 6, save and except non-working foremen and persons above that rank".

2. Counsel for the respondent and counsel for the objectors opposed the request of the applicant to amend the bargaining unit for which the applicant is seeking certification. It was the position of counsel for the respondent that the applicant is a council of trade unions unless the Board found the applicant to be something different. It was the position of counsel that where there exists such a council then a member trade union cannot apply for certification independently. Counsel referred to section 119 and 144 of the *Labour Relations Act* and argued that in order to give any meaning to sections 144(3) such an application has to be made by a trade union itself. Counsel further argued that if the Board held that the definition section 1(1)(p) applied then "trade union" did include a council of trade unions and a provincial council. He argued that in these circumstances the difference between section 144(1) and (3) had no meaning. It was the position of counsel that in these circumstances the proposed amendment ought not to be permitted. Counsel also opposed the proposed amendment of the bargaining unit on the additional ground that since the respondent is a small cement company with less than thirty employees the appropriate bargaining unit ought to indicate the geographic areas in which the respondent is working. It was the view of counsel that the bargaining unit as defined by the proposed amendment would not permit employees, who all came from a common pool, working outside the Board's geographic area No. 6 to participate in the selection of a bargaining agent. It was also the position of counsel that to permit an amendment to the bargaining unit would permit the applicant to gerrymander a bargaining unit.

3. Counsel for the objectors characterized the proposed amendment to the bargaining unit as unfair in that the employees have no opportunity to respond. Counsel claimed that ninety-five per cent of the work of the employees is in the residential sector of the construction industry and that the Board ought not to permit this artificial amendment.

4. Counsel for the applicant argued that the bargaining unit in its original and amended form related to construction labourers in the construction industry and that the applicant was entitled to make its application under either section 144(1) or (3) of the *Labour Relations Act*. It was the position of counsel that the applicant had a choice until it saw the list of employees filed by the respondent. Counsel argued that the applicant as a council of trade unions within the meaning of section 1(1)(p) is able to make an application under either section 144(1) or (3).

5. An application for certification under the provisions of section 144(1) may be made by an employee bargaining agency or one or more affiliated bargaining agents of the employee bargaining agency. Such an application which relates to the industrial, commercial and institutional sector of the construction industry may be made even if there are no employees employed in the industrial, commercial and institutional sector of the construction industry. See *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729. An application for certification under the provisions of section 144(3) may be made by a trade union represented by an employee bargaining agency. The refer-

ence to section 119(1) in section 144(3) recognizes the situation of trade unions which are represented by an employee bargaining agency. The applicant is both an affiliated bargaining agent within the meaning of section 137(1)(a) and a council of trade unions within the meaning of section 1(1)(g). The applicant is also a trade union represented by an employee bargaining agency. In addition, the applicant has established itself as a certified council of trade unions. See, section 1(1)(p) of the *Labour Relations Act* and the Employee Bargaining Agency Description of the Minister of Labour dated September 30, 1983, made pursuant to section 139(1) of the *Labour Relations Act*. The applicant may therefore make an application under either section 144(1) or (3).

6. The next issue before the Board is whether the applicant ought to be permitted to amend its bargaining unit. In the view of the Board the conduct of the applicant may not be characterized as gerrymandering. The applicant has merely contracted the size of the bargaining unit for which it is seeking certification. The employees were advised in Form 78, Notice to Employees of Application for Certification, Construction Industry, that an application had been made "in the following unit claimed to be appropriate". There is no guarantee that such a bargaining unit would be found to be appropriate by the Board. The employees and the respondent have received notice of this proposed amendment to the bargaining unit.

7. With regards to the other matters raised, the Board notes that the *Labour Relations Act* does not distinguish between small employers or the number of employees. The only limitation is that an appropriate bargaining unit must consist of more than one employee. See section 6(1). The applicant is under no obligation to expand the scope of this application to include all of the geographic areas in which the respondent operates. The Board ascertains the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the applicant as is required in section 7(1). It is these employees whose views are considered by the Board in making the determinations required in section 7.

8. The Board finds therefore that the appropriate bargaining unit is all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. A Labour Relations Officers it authorized to inquire into and report to the Board on the list and composition of the bargaining unit.

10. This panel of the Board is not seized with this application.

3109-88-R; 3120-88-R International Brotherhood of Electrical Workers, Local 353, Applicant v. **P & M Electric (1982) Ltd.**, Northland Electric (Ont.) Limited, Respondent v. Group of Employees, Objectors; I.B.E.W. Construction Council of Ontario, International Brotherhood of Electrical Workers, Local 105, International Brotherhood of Electrical Workers, Local 353, Applicants v. **P. & M. Electric Limited**, Pomico Holdings Inc., **P & M Electric (1982) Ltd.**, Northland Electric (Ont.) Limited, Respondents

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *S.B.D. Wahl*, *M. Oram* and *Robert Parker* for the applicant; *Stephen A. McArthur*, *Boyd Pollock* and *Brian Loewen* for the respondents; *Leo DiTomaso* and *Jason Longworth* for the objectors.

DECISION OF THE BOARD; June 7, 1989, as amended July 4, 1989

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
2. Board File No. 3109-88-R is an application for certification within the meaning of section 119 of the Act and is made pursuant to section 144(3). As such, it does not relate to the industrial, commercial and institutional sector of the construction industry which is referred to in section 117(e) of the Act.
3. Board File No. 3120-88-R is an application for relief under sections 1(4) and 63 of the *Labour Relations Act*.
4. The two matters came on for hearing together. On agreement of the parties, consideration of the application in Board File No. 3120-88-R was deferred until such time as it became necessary to deal with it for purposes of the certification application in Board File No. 3109-88-R.
5. In the certification matter, the applicant seeks to be certified for a unit of employees it describes as follows:

"all certified journeymen electricians and registered apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in, the Municipality of Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing in the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario (OLRB Geographic Area 8); save and except non-working foremen and persons above the rank of non-working foreman."[sic]

The applicant submits that the Board is obliged to apply the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1990 Chapter 24 as a statute of general application, both in describing the bargaining unit and in determining which employees are properly included in it for purposes of this application. In that respect, it relies upon the Supreme Court of Canada decision in *McLeod et al v. Egan et al* (1974) 46 D.L.R. (3rd) 150 and a number of arbitral awards. The applicant also relies on the Board's own decisions in *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C T Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Nov. 1563; *Phase IV (Four) Electrical Contractors Limited*,

(Board File No. 2792-87-R unreported decisions dated March 25, 1988 and July 5, 1988), and *B.C. Meck*, [1988] OLRB Rep. June 546. It submits that where an applicant for certification is a construction trade union which represents persons in a compulsory certified trade within the meaning of the *Apprenticeship and Tradesmen's Qualification Act*, it is appropriate to describe the bargaining unit in terms of that trade and to include in such unit, for the purpose of an application for certification, only employees who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualification Act*.

6. The respondent submits that although the Board is obliged to apply statutes of general application, the Board must not abdicate its duty, under section 6 of the Act, to determine the unit of employees that is appropriate for collective bargaining in an application for certification. In that respect, the respondent submits that, for the purpose of describing the bargaining unit in determining which employees are in it, the Board should concern itself with the work that employees do and not with their status under a statute other than the *Labour Relations Act*. The respondent could not refer the Board to any authority for its position. (In fairness to the respondent and its counsel, we note that in its April 10, 1989 decision herein, the Board (differently constituted in part) raised these issues with reference to the Board's recent decision in *Superior Contracting*, [1988] OLRB Dec. 1348.)

7. The applicant's standard construction industry bargaining unit has generally (there have been exceptions) been described in terms of journeymen and apprentice electricians. Adjectives such as "qualified", "certified", or "registered" have not (generally) been used in the bargaining unit description.

8. Sections 1(a) and (b), 9, and 11 of the *Apprenticeship and Tradesmen's Qualification Act* provide that:

1. In this Act,

- (a) "apprentice" means a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade;
- (b) "certified trade" means a trade designated as a certified trade union section 11;

• • •

9.(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship of qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period of three months mentioned in clause (1)(b), cease to work in that trade until he files with the Director his contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

• • •

11.(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate or qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

Pursuant to Regulation 32 R.R.O. 1980, under the *Apprenticeship and Tradesman's Qualification Act*, the trade of "electrician" is a compulsory certified trade. Consequently, a person must be either a journeyman or apprentice in that trade within the meaning of the *Apprenticeship and Tradesman's Qualification Act* in order to be able to lawfully work or be employed as an electrician in Ontario.

9. The *Apprenticeship and Tradesman's Qualification Act* is a statute of general application in the Province of Ontario. Its purpose is to regulate the training and qualifying of tradesmen and, in the case of a compulsory certified trades, to regulate the persons who can work at various trades so designated. Although it is not for this Board to enforce statutes like the *Apprenticeship and Tradesman's Qualification Act*, the Board is, in our view, obligated to not make decisions or proceed in ways which are inconsistent with laws of general application which are specifically directed at matters with which it must be concerned in the course of exercising its powers in performing the duties conferred or imposed upon it by or under the *Labour Relations Act*.

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesman's Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. Further, the issue of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board's approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs at 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesman's Qualification Act*.

11. The Board is also satisfied that there is no reason to not give the terms "journeyman"

and “apprentice” the same meaning in proceedings before the Board as those terms have under the *Apprenticeship and Tradesman’s Qualification Act*. Consequently, it would be redundant to use words such as “qualified”, “certified” or “registered” to describe either journeyman or apprentice electricians.

12. We assume that the applicant’s description of the bargaining unit (which was repeated by the respondent in its reply) has mistakenly rather than intentionally misdescribed Board Area 8.

13. In the result, the Board finds that all journeyman and apprentice electricians in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The respondent filed a list of employees which contained 17 names on Schedule “A”. Subsequently, the parties agreed to the deletion of one name but the respondent sought to add four others. It was common ground that none of the four persons whose names the respondent sought to add are either journeyman or apprentices electricians within the meaning of the *Apprenticeship and Tradesman’s Qualification Act*. Having regard to our conclusions as aforesaid, none of them should be included on the list of employees. Consequently, the Board finds that there were 16 employees in the bargaining unit at the time the application was made.

15. In support of its application for certification, the applicant filed membership evidence in it in the form of fourteen combination application for membership and receipt documents, ten of which refer to employees in the bargaining unit at the time the application was made. All the membership evidence contains the names and original signatures of the persons with respect to whom the documents were submitted. The receipts are countersigned by the collector and indicate that a payment of \$1.00 was made by the person applying for membership within the six month period immediately preceding the terminal date fixed for the application. The documents and money were collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency of the membership evidence.

16. Also filed with the Board were six handwritten statements of desire (commonly known as “petitions”), in opposition to the application. Three, which bear thirteen signatures in total, were filed in a timely manner. The remaining three, which contain one signature each, were neither delivered to the Board nor mailed by registered mail by the terminal date and are therefore untimely. Of the six employees in the bargaining unit who signed the timely petition, only one had previously signed an application for membership, and paid \$1.00 with respect thereto, in the applicant. It is only those bargaining unit employees who first signed union membership documents and subsequently signed a petition whose signatures are relevant to the Board’s considerations. This is because employees for whom no membership evidence is filed are treated as being opposed to the application. Consequently, the signature of a non-union member on a petition can add nothing to the assessment of the support enjoyed by the applicant (see for example, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138). The Board therefore finds that the timely petition is not relevant to its considerations because even if it is voluntary, it would not raise sufficient doubt concerning the continued support for certification enjoyed by the applicant to cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken

despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time.

17. The Board is satisfied, on the basis of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 3, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. The hearing with respect to these two applications will continue on the dates previously scheduled. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all outstanding issues in them.

0612-89-FC National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Lau Division - Philips Air Distribution Ltd., Respondent

Evidence - First Contract Arbitration - Practice and Procedure - Respondent objecting to the Board receiving a supplementary statement of material facts filed outside time limits in Practice Note - Board not granting leave to applicant to adduce evidence relating to the new allegations in its supplementary statement

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. W. Pirrie* and *A. Hershkovitz*.

APPEARANCES: *John Moszynski* and *Bruce Davidson* for the applicant; *Harvey Beresford*, *T. F. Storie* and *Rex Clark* for the respondent.

DECISION OF THE BOARD; June 27, 1989

1. National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1352 ("the C.A.W.") filed an application for direction that a first collective agreement be settled by arbitration under section 40a of the *Labour Relations Act* ("the Act"). The C.A.W. had been certified to represent employees of the respondent, Philips Air Distribution Ltd. at its Lau Division and Canada Fans Division ("Philips") on August 18, 1988.

2. The C.A.W. filed its application on June 1, 1989. The respondent served its reply in conformity with Practice Note 18. The C.A.W. subsequently filed what it called "Supplementary Statement to Schedule "A" Dated - June 1, 1989" ("Supplementary Statement"); it was dated June 14, 1989 and received by the Board June 15, 1989. The first day of hearing was scheduled for June 20, 1989.

3. At the outset of the hearing, counsel for Philips objected to the Board's accepting the June 14th Supplementary Statement on the basis that it was filed too late; alternatively, he indicated that the respondent required particulars of certain allegations in the Supplementary Statement and might require an adjournment. Counsel for the C.A.W. advised that it would be "forced" to withdraw its application if we did not grant leave to call evidence on the matters raised in the Supplementary Statement; he contended that the Board would have used a procedural rule

to prevent redress of a situation falling squarely within the mischief addressed by section 40a of the Act (here he appeared to suggest that refusing to accept the Supplementary Statement would somehow make the Board responsible for the continuation of the strike). Counsel for the C.A.W. urged us to give the direction sought on the basis that the respondent had conceded that bargaining had broken down and that there had been a strike in progress since February 13, 1989; in effect, his position was that we should give a direction on the basis of the pleadings alone. Counsel for the respondent argued that this was not a preliminary matter.

4. After hearing counsel's submissions on both issues we recessed and reconvened to deliver two oral rulings with reasons. We declined to grant leave to the C.A.W. to lead evidence on the issues raised in its "Supplementary Statement" and declined to give the direction as requested by counsel for the C.A.W. in his preliminary motion.

5. With respect to the latter issue, counsel for the applicant points to such statements in the respondent's reply such as that which appears in paragraph 1 of Schedule "E" to that rely: "Indeed, the Company takes the position that had it so chosen, a case could be made by it for a declaration that a first Collective Agreement be imposed on the basis that the Union has bargained in bad faith". It is common ground that the employees went on strike on February 13, 1989 and it does not appear to be in dispute that they remain on strike. We gave the following oral ruling on this matter:

The applicant seeks a declaration on the basis that the respondent has conceded that bargaining has broken down and that there has been a lengthy strike with no hope of settlement. Counsel says this is "any other reason the Board considers relevant" under paragraph 40a(2)(d) of the *Labour Relations Act*. Counsel for the respondent says that the respondent has not made that concession. Even assuming certain statements in the respondent's material *could* be interpreted that way (and we are not saying here that they can or should be), we are not prepared to find as a preliminary matter that the mere existence of a strike - lengthy or otherwise - constitutes any other relevant reason for imposing a first contract. Section 40a requires that the bargaining process has been unsuccessful "because of" some conduct or event. The determination of whether bargaining has been unsuccessful because of a particular reason(s) -- that is, the determination of whether there is a link between the conduct or event and the break down of bargaining -- is a matter for evidence. Counsel's motion for a direction at this stage of the proceedings is refused.

6. On the objection to our accepting the Supplementary Statement, we note that the time requirement set out in subsection 40a(2) of the Act ("The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application....") has been treated by the Board as a direction to deal with first contract applications in an expeditious manner, indeed, even more so than with most other matters coming before the Board, with some sense of urgency. In order to maximize the chances of completing first contract applications within thirty days, the Board has prepared Practice Note 18 which imposes strict requirements on the parties with respect to the nature and timing of filings. On this issue, we gave the following oral ruling:

Practice Note 18 is clear: "Except with leave of the Board, parties will not be permitted to adduce evidence at the hearing of any material fact not disclosed in the material filed with the Board" -- the reference is to the detailed statement which must be filed with the application. The reason for that

requirement and for its strict observance is the statutory time limits imposed on first contract determinations. In this case, certain of the allegations in the supplementary material [in particular, and as agreed by the parties, allegations of contacts by the respondent with individual employees, of failure to recognize the local economy and of the respondent's actions during the strike] raise entirely new "material facts" to which the respondent would have to have an opportunity respond -- this could only lead to delay. There is no reason for delay - this application can proceed as originally filed to be considered and determined in the usual course.

The only reason given by counsel for our granting leave to file the supplementary statement is that the original was filed by a non-lawyer. That quite simply cannot be a reason for deviating from the Board's necessarily strict interpretation of the Practice Note. Parties must decide for themselves whether they want to use legal advice or representation or not, a decision not to do so cannot give a party an advantage. The applicant has given no other reason for our granting leave and therefore one must assume that had the original material been filed by counsel there would be no reason to grant leave. We are not persuaded that we should grant leave to the applicant to adduce evidence relating to the new allegations in its Supplementary Statement.

The respondent has raised no objection to the original application's proceeding and has pointed to no perceived deficiency at this stage. We are prepared to proceed with the application as originally filed after the lunch break.

7. After the lunch break, counsel for the C.A.W. advised that the C.A.W. was seeking leave to withdraw its application because, he said, the application was "procedurally deficient" (in this regard, there was no allegation by the respondent nor any indication by the Board, that the application as originally filed was "procedurally deficient"). Although counsel for the respondent requested that we dismiss the application in order to make "the record clear" that the respondent had complied with the requirements, we declined to do so, since there is no legally relevant distinction in such cases between withdrawal and dismissal. In light of C.A.W.'s counsel's comments, however, especially during the early part of the hearing with respect to the Board's refusing leave to adduce evidence on the issues raised by the Supplementary Statement, we made it clear that it was the C.A.W.'s own choice to delay resolution of this matter and that if it was not satisfied with the application as originally filed, it must bear the burden of delay consequent upon its withdrawal.

8. This matter is therefore terminated.

1285-88-JD Lumber and Sawmill Workers' Union, Local 2995, Applicant v. Canadian Paperworkers' Union, Local 89, and Spruce Falls Power and Paper Company Limited, Respondents

Evidence - Jurisdictional Dispute - Practice and Procedure - Complainant failing to comply with the Board's rules and practice note concerning filings - Respondents objecting to the introduction of two documents and any evidence of area practice - Board not allowing evidence in - Complaint involving the transportation of heavy equipment on float trucks - Criteria and delay of 10 years favouring status quo - Complaint dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *K. Davies*.

APPEARANCES: *James Fyshe*, *Norm Rivard*, *Raymond Boissonneault* and *Roger LePage* for the applicant; *J. James Nyman*, *Gerald T. McMeekin*, *R. Casson* and *Enzo Altobelli* for Canadian Paperworkers' Union, Local 89; *G. F. Luborsky*, *G. J. Boucher* and *P. Barrett* for Spruce Falls Power and Paper Company Limited.

DECISION OF THE BOARD; June 5, 1989

1. In this complaint made pursuant to section 91 of the *Labour Relations Act*, Lumber and Sawmill Workers' Union, Local 2995 ("Local 2995") complains that members of the Canadian Paperworkers Union, Local 89 ("Local 89") are being assigned certain work by Spruce Falls Power and Paper Company, Limited ("Spruce Falls") which Local 2995 considers the work of its members. The work in dispute concerns the transportation of heavy equipment on float trucks. At the time of the complaint, two float trucks and a spare float truck were assigned to members of Local 2995 while one float truck was operated by a member of Local 89 out of the Spruce Falls garage in the Town of Kapuskasing. Local 2995 requests that all of the floating work be assigned to its members while both Spruce Falls and Local 89 take the position that the status quo be maintained.

2. Before setting out the facts, the Board will deal with two evidentiary rulings it was required to make during the course of entertaining the evidence. These two rulings concern the application of Rule 60 of the Board's Rules of Procedure and Practice Note #15 (Jurisdictional Dispute Complaints) which was amended and became effective on August 2, 1988.

3. This complaint was filed with the Board on August 29, 1988. The complaint as filed did not indicate that Local 2995 intended to rely on area practice, nor did it contain two documents which we will refer to as C-1 and C-2. The respondents were required to file their replies no later than 21 days from the date they were served with the complaint. A panel of the Board conducted a pre-hearing conference on November 28, 1988 and, at this stage of the proceeding, Local 2995 indicated that it intended to rely on C-1 and C-2. There was some discussion of area practice at the pre-hearing conference and Local 2995 undertook to advise the Board and the respondents on or before December 30, 1988 whether it would be seeking to call evidence of area practice and, if so, the nature and scope of the evidence. Local 2995 sent letters dated January 30 and February 1, 1989 to the respondents and the Board which indicated it intended to rely on area practice and the nature of the evidence it intended to call. The first day of hearing before the present panel was on February 9, 1989. The respondents objected to the introduction of C-1 and C-2 in addition to any evidence of area practice as a result of Local 2995's failure to comply with Rule 60 and Practice Note #15.

4. Counsel for Local 2995 advised the Board that he was not provided with C-1 and C-2

until the pre-hearing conference. The reason for this, as we understand it, was that his advisor, to whom C-1 was addressed and the individual who wrote C-2, did not review Local 2995's general correspondence file until immediately before the pre-hearing conference. Local 2995 provided virtually no explanation for failing to refer to area practice in its complaint or for failing to comply with the undertaking it gave at the pre-hearing conference. Counsel did note that Local 2995 experienced some difficulty in complying with the undertaking due to the Christmas period. With respect to both matters, counsel for Local 2995 argued that the Board should exercise its discretion in favour of Local 2995 since the respondents were aware of the evidence Local 2995 intended to introduce prior to the hearing, they were not prejudiced and the respondents could request an adjournment if they felt they needed one. After entertaining the parties' positions concerning the evidentiary issues, the Board ruled orally at the hearing that it would not permit Local 2995 to call evidence of area practice, nor would it allow it to rely on C-1 and C-2.

5. The relevant portions of Practice Note #15 are as follows:

1. The Board has adopted a pre-hearing conference procedure for jurisdictional disputes heard by the Board under section 91 of the *Labour Relations Act*. The Board will schedule a pre-hearing conference before a Vice-Chair and/or Board Members. The purpose of this pre-hearing conference is to settle the dispute or, in the absence of settlement, to narrow the issues in dispute.

2. The parties are required to file complaints, replies or interventions in accordance with the Board's Rules and this Practice Note, and, in particular in accordance with Rule 60. Rule 60 states:

60. A complainant shall file together with his complaint, and every person served with a notice of application shall file together with his reply,

- (a) any union constitution;
- (b) any collective agreement;
- (c) any agreement or understanding between trade unions as to their respective jurisdictions on work assignment;
- (d) any agreement or understanding between a trade union and an employer as to work assignment;
- (e) any decision of any tribunal respecting work assignment; and
- (f) any other document,

relating to the work in dispute which may be in his possession and upon which he proposes to rely in support of his claim for relief or his claim that the relief requested should not be granted, as the case may be, and a statement as to any area or trade practice relating to the work in dispute, and pictures, diagrams or drawings of the disputed work.

IN ADDITION, each party must, *at the same time*, file a brief which contains a concise statement of the issues in dispute, including a detailed description of the work in dispute, and the material facts upon which it intends to rely.

...

4. The complainant must file its complaint and the material referred to in paragraph 2 in quadruplicate with the Board. ...

...

6. A reply and the material referred to in paragraph 2 must be filed in quadruplicate with the Board. The reply must be accompanied by a certificate of service as set out in paragraph 7 in respect of each other party. All respondents and others served with notice of the complaint must file their replies and other material referred to in paragraph 2 with the Board no later than twenty-one (21) days from the date service of the complaint was effected on them by the complainant. If the twenty-first day falls on a day on which the Board's offices are not open to the public, the reply with accompanying material must be filed no later than the next business day of the Board.

• • •

8. EXCEPT WITH LEAVE OF THE BOARD, PARTIES WILL NOT BE PERMITTED TO ADDUCE EVIDENCE AT THE HEARING OF ANY MATERIAL FACT NOT DISCLOSED IN THE MATERIAL FILED WITH THE BOARD PURSUANT TO THIS PRACTICE NOTE.

6. The Board's rules and practice concerning jurisdictional dispute complaints, particularly Rule 60 and Practice Note #15, are designed to assist the parties in the resolution and the adjudication of jurisdictional disputes. Once the complaint and any replies are filed, the Board schedules a pre-hearing conference in order to assist the parties in settling the dispute or to narrow the issues in dispute. If it is necessary to have a hearing, which is often the case, compliance with the Rules, the Practice Note and the work of the pre-hearing conference should result in more productive and shorter hearings than would otherwise be the case. In order for the procedure to produce the intended results, it is crucial for the parties to comply with the requirement to file what is required to be filed by Rule 60 and the Practice Note in a timely fashion. In this matter, each party was obliged to file any documents it intended to rely on and the statement of the area practice it asserts is relevant with its complaint or reply, as the case may be. At the pre-hearing conference, each party and the Board should be aware of the issues in dispute, and the the material facts and the documents upon which each party intends to rely. The extent to which this does not occur will result in the failure to meet the objectives the procedure is intended to achieve.

7. Prior to the amended Practice Note, it was not uncommon for parties to fail to meet the filing requirements of Rule 60 and the previous Practice Note (see, for example *Marine-Hamlyn Joint Venture*, [1988] OLRB Rep. Feb. 158). The revision of Practice Note #15, which adopts procedures similar to those contained in the Practice Notes on first collective agreement arbitration, should indicate to the community that the Board is serious in its efforts to adopt and follow procedures which will assist in the resolution and adjudication of jurisdictional disputes.

8. Paragraph 8 of Practice Note #15 provides that parties will not be permitted to adduce evidence at the hearing of any material fact not disclosed in the material filed with the Board, except with leave of the Board. The wording of the paragraph indicates that a party who fails to comply with the Rules and the Practice Note will not be permitted to introduce certain evidence unless that party can satisfy the Board that the circumstances warrant granting leave. Although the Board may consider any factors it considers relevant, particular significance will be given to the reason why a party has failed to comply with the Rules and Practice Note.

9. In reviewing the circumstances here, the Board notes that it is the complainant, the party which can choose the timing for filing the complaint, which has failed to comply with Rule 60 and Practice Note #15 as well as its undertaking concerning area practice. In its complaint, Local 2995 did not indicate it intended to rely on area practice and it failed to comply with its undertaking concerning area practice. Local 2995 only advised the parties with respect to its intentions with respect to area practice a short time before the first day of hearing on the merits. With respect to this failure, Local 2995 did not provide us with any satisfactory explanation for why it did not comply with Rule 60 and Practice Note #15. Similarly, no satisfactory explanation was given by the

Local 2995 for failing to include C-1 and C-2 with its complaint. The fact that Local 2995's representative did not check the Local's general correspondence and discover C-1 and C-2 until just prior to the pre-hearing conference does not constitute a satisfactory explanation. The evidence of area practice and C-1 and C-2 were in the possession of Local 2995 when it filed its complaint and the failure to comply with Rule 60 and Practice Note #15 is attributable only to Local 2995. In exercising its discretion, the Board was satisfied, given all of the circumstances and particularly those referred to above, that it would have been inappropriate to grant Local 2995 leave to introduce C-1 and C-2 or any evidence of area practice.

10. In determining the facts with respect to the merits of the complaint, the Board has considered the evidence of the four witnesses called by Local 2995, the agreed-to facts as disclosed in the pre-hearing memorandum, the exhibits and the parties' submissions thereto. The Board notes that Spruce Falls and Local 89 elected to call no *viva voce* evidence.

11. Spruce Falls is in the business of manufacturing newsprint. It operates a mill in the Town of Kapuskasing which it supplies with trees harvested in its Woodlands operation. As one might expect, the Woodlands operation is highly mechanized and a considerable variety of heavy equipment is utilized to harvest trees in Spruce Falls' cutting area, commonly referred to as "the limits". In order to service and maintain its equipment, Spruce Falls operates a number of maintenance facilities which are within its Woodlands operation. Two rather large garages, which are not portable, are located in depots in the limits and in addition to these larger facilities, Spruce Falls has field garages on certain sites which are portable and move with the cutting. A large garage, which is considered a part of the Woodlands operation, is located on the mill site ("Town garage"). Given the nature of the operation, the majority of the maintenance work is performed at the facilities located on the limits. The Town garage is used to service equipment used at the mill site and any overflow of equipment requiring repair from the limits. The need to transport heavy equipment, primarily as a result of mechanical problems, arises frequently. As noted earlier, the equipment is transported by means of a float truck, a term which refers to a tractor that is attached to a flat-bed trailer. Float trucks are used to transport equipment used in the Woodlands operation both within the limits and between the limits and the Town garage.

12. Local 2995 and Local 89 have had a bargaining relationship with Spruce Falls since at least the 1950's. The collective agreement Local 2995 has with Spruce Falls recognizes Local 2995 as the bargaining agent for all of its employees engaged in woods operations on the limits and on the work sites of Spruce Falls. Local 89's collective agreement with Spruce Falls covers all employees who are employed in occupations which have the rate of wages fixed for the term of the agreement. In essence, Local 89 represents certain employees engaged in production at the mill as well as certain trade groups, such as machinists, welders, millwrights, instrument mechanics, etc. Local 89 has jurisdiction for the Town garage while 2995 has jurisdiction for those maintenance facilities located on the limits. The Local 2995 and the Local 89 collective agreements both contain classifications covering the floating of equipment and the members of both unions have performed float work since approximately the late 1950's.

13. The vast majority of the floating work is performed on Spruce Falls' limits, the area over which Local 2995 has jurisdiction. Yet, as noted above, Local 2995 has never had exclusive jurisdiction over the floating of equipment. The history of the floating work can be divided into essentially two periods, the pre-1978 years and the post-1978 years. In the pre-1978 period, Local 89 members operated at least one float, and sometimes two, which were located at the Town garage. Local 2995 members operated as many as three floats during this period which were located at Camp 86 and Camp 87, the sites for the two large garages referred to earlier. The foreman of the Town garage and the foremen at Camp 86 and Camp 87 dispatched the floats as

required. During this period, Spruce Falls assigned the floating work to members of both unions on the basis of what was most appropriate and not on the basis that certain floating work belonged to one union as opposed to the other. Beginning in approximately 1970 Spruce Falls centralized the float operation during the winter haul, which is essentially between December 15 and March 15, at Camp 16 and referred to as Control. All of the floats are located at Control, even the Town floats, and are dispatched by the Control foreman, a foreman within the Woodlands department.

14. The only material difference between the pre-1978 and post-1978 period is that Spruce Falls made a distinction between what floating work belonged to each union. In at least the set of negotiations prior to 1978, and perhaps even beginning with the 1974 negotiations, Local 2995's proposals contained the demand that all floating and transporting of material to woods operations be done by members of Local 2995. With this demand, Local 2995 attempted to obtain for its members jurisdiction over all floating of equipment, as well as all "toting". Toting is performed by five employees in the Spruce Falls' transportation department and consists of the transportation of supplies to the limits in small trucks. This demand was rejected by Spruce Falls. The collective agreement negotiated in 1978 gave Local 2995 jurisdiction over all inter-camp floating. In negotiations subsequent to 1978, except for the 1984 set of negotiations, Local 2995 continued to demand, and Spruce Falls continued to reject, that all floating and toting be performed by its members. When Local 2995 demanded all floating and toting in the 1987 negotiations, Spruce Falls took the position with Local 2995 that it could not take the issue to impasse. As a response to Spruce Falls' position, Local 2995 withdrew its demand and filed a grievance in December 1987. At the third step of the grievance held in March 1988, Spruce Falls took the position that the grievance was not arbitrable and that the jurisdictional dispute over floating was a matter for the Labour Relations Board. This led Local 2995 to file this complaint.

15. As a result of developments at the bargaining table in 1978, the floating work has been allocated since that time on the following basis. Members of Local 2995 perform all of the inter-camp floating or in other words, all floating from and to points within the limits. Member of Local 89 transport equipment from the Town garage to the limits and from the limits to the Town garage. In circumstances where a Town float was unavailable, Spruce Falls would assign the floating work normally performed by a Local 89 member to a member of Local 2995. With the allocation of all inter-camp floating to Local 2995 members, Local 2995 members acquired by far the largest percentage of the floating work.

16. In 1987, Spruce Falls centralized the dispatching of the floats in effect to duplicate in the remaining 9 months of the year what it did since 1970 during the 3 months of the winter hauling period. Since 1987, all floats are dispatched by a Woodlands department foreman, rather than a Camp foreman or the Town garage foreman, from Camp 45, a facility within the Town of Kapuskasing. All floats (2 floats and a spare) are located at Camp 45 except for the Town float which continues to be located at the Town garage.

17. The evidence indicates that members of both unions have had concerns over the years with respect to the way Spruce Falls assigned a particular load. Problems of this sort led to discussions between the parties and the resolution of the problem. The members of Local 2995, in particular, have had concerns about a Local 89 float transporting equipment on the limits, an area viewed by them as their exclusive jurisdiction. This situation has resulted in some tension between the members of Local 2995 and Local 89, particularly during times when Local 2995 members are on lay off. Over the years, members of both unions have experienced lay-offs as a result of technological developments and for other reasons. In 1987 and at a time when Local 2995 renewed its efforts to obtain all floating and toting, Local 2995 experienced significant lay-offs. If Local 2995 were to obtain jurisdiction for all floating, a member of Local 89 would be laid off.

18. In the pre-1978 period, Spruce Falls was able to manage its floating operation efficiently. One cannot say the same for the post-1978 period. Given that all inter-camp floating is to be performed by Local 2995 members and that the Local 89 float is to perform the floating to and from the Town garage when available, Spruce Falls cannot utilize the floats as efficiently as it once did. The Board heard evidence about the Local 89 float and a Local 2995 float passing empty on the road. As well, evidence was given about situations where it would take the Local 89 float a considerable number of hours to get to and transport a machine to the Town garage when a Local 2995 float was close by and would have been in a position to perform the job in a shorter period of time. Although the evidence did not disclose the extent to which the post-1978 restrictions affected the efficiency of the floating operation, particularly in the context of Spruce Falls' overall operation, the Board is satisfied that the floating of equipment is performed less efficiently after 1978 than it was before that year.

19. Section 91(1) of the Act provides as follows:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

20. In exercising its discretion under section 91 of the Act, the Board has used a variety of criteria. It is not unusual for the Board to consider collective bargaining relationships, skill and training, economy and efficiency, employer practice, area practice, the nature of the work and job loss, safety and employer preference. Given the circumstances in this case, a number of these criteria are not of much assistance. As a result of the Board's evidentiary ruling, the Board did not have any evidence before it relating to area practice. Little, if any, evidence was called with respect to safety, the nature of the work and skill and training. It is clear that the weight of these factors would not favour one party's position over the others. Therefore, the relevant criteria for our purposes in this case are the collective bargaining relationships, economy and efficiency, employer practice, employer preference, job loss and delay.

Collective Bargaining Relationships

21. Counsel for Local 2995 argued that when one viewed the collective bargaining relationships, particularly when combined with employer practice, one should conclude that this factor favoured Local 2995. Counsel emphasized the jurisdictional provisions contained in both union's collective agreements and the fact that the vast majority of the floating work is within 2995 jurisdiction. In our view, this factor does not favour either union. Each union has within its respective collective agreement a classification that covers the disputed work and members of both unions have worked within those classifications for a considerable number of years.

Economy and Efficiency

22. Although the evidence concerning this element does not provide a complete picture, the Board is satisfied that this factor slightly favours Local 2995. The floating operation would be more efficient if Spruce Falls were free to use its discretion in allocating the float work between members of the two unions. The extent to which the floating operation is inefficient is attributable to the fact

that Local 2995 demanded and obtained the right to have its members perform all the inter-camp floating.

23. In jurisdictional disputes, it is most often the employer that argues in favour of a particular assignment for reasons of economy and efficiency. The application of this particular criteria in most cases, therefore, usually supports the employer's position. Here, Spruce Falls takes a position which appears to be to its disadvantage economically. However unusual this may be, the Board concludes that the economy and efficiency factor slightly favours Local 2995.

Employer Practice

24. What is striking about the history of this employer's floating operation is that Local 2995 has never had exclusive jurisdiction over the floating work. Prior to 1978, it appears that the floating work was essentially shared by the two unions and subsequent to 1978, although Local 2995 members performed most of the floating work, members of Local 89 continued to perform some. The employer's practice over a considerable number of years has been to assign floating work to members of both unions, even in the face of demands by Local 2995 that its members perform all the floating work. This factor does not favour the position advanced by Local 2995.

Employer Preference

25. As noted earlier, Spruce Falls has taken the position in this matter that the status quo should be maintained. Local 2995 called some evidence concerning an approach made by Spruce Falls in 1987 with respect to floating which in its view should lead us to conclude that Spruce Falls recognizes the inefficiency of the present operation and that Spruce Falls would prefer Local 2995 members to do all the floating. We do not find it necessary to detail this evidence. Suffice it to say that Local 2995 advised Spruce Falls that it would not accept its proposal and the proposal, in any event, would not have given Local 2995 jurisdiction over all of the floating work. It was shortly after this discussion between Spruce Falls and Local 2995 representatives that Spruce Falls centralized its dispatching of floats at Camp 45 as described earlier. We do not accept Local 2995's submission that the discussions in 1987 disclose an employer preference contrary to the position it has taken before us in this proceeding. Spruce Falls' practice and its repeated resistance during negotiations to Local 2995's demand for jurisdiction over all floating, indicates that Spruce Falls prefers Local 89 members perform some floating.

26. One of the reasons Spruce Falls prefers to maintain the status quo relates to maintaining the integrity of the bargaining process. In its view, it has had "a deal" with Local 2995 since 1978 which provides that Local 2995 does not have exclusive jurisdiction over floating. The understanding it has with Local 89 is that its members will perform a certain amount of the floating work. Spruce Falls prefers the status quo, or in other words, it prefers that the results of the bargaining process be maintained since it has concerns that the breaking of this deal will perhaps affect other deals regarding the allocation of work, not only between these unions but between other unions that have bargaining rights for its employees. There is an agreement, for instance, that Local 2995 members can unload in the mill yard, an area within Local 89's jurisdiction, during a certain time of the year. Spruce Falls is concerned that if Local 2995 succeeds in this matter in obtaining what it has been unable to get at the bargaining table, it may affect Local 89's willingness to continue with certain agreements of this sort. In our view, this concern, which is one of the reasons for the employer's preference, is a legitimate concern. The factor of employer preference does not favour Local 2995 but rather, it favours the position advanced by Spruce Falls and Local 89.

Job Loss

27. As noted earlier, the evidence discloses that one of Local 89's members will be laid-off if all the floating is performed by members of Local 89. Although it is the case that both unions have experienced a loss of members over the years, one's focus in determining the significance of this factor has to be with respect to the disputed work. In taking this approach here, the Board concludes that this factor slightly favours the position taken by Local 89 and Spruce Falls. We say slightly since we are not dealing with a considerable job loss and it is usually inevitable in resolving disputes of this sort that a decision on the assigning of work will have an impact on jobs performed by one union's members as opposed to another.

Delay

28. Counsel for Local 89 raised the issue of delay. As we understood counsel's position, he argued that the Board should at least not exercise its discretion in Local 2995's favour given its delay in filing this complaint. Local 2995's witnesses were asked why the complaint was filed when it was. It is clear that since the mid-70's and probably long before this time, Local 2995 had the view that all of the floating work was work belonging to its members. However, the grievance filed in 1987 referred to earlier and this complaint represents the only formal attempts on the part of Local 2995 to assert their rights. As one witness put it, Local 2995 felt it was time to bring the issue "to a head".

29. Most jurisdictional disputes arise in the context of an assignment of certain work to members of one union and another union quickly asserting that the work belongs to its members. If the matter cannot be resolved, a complaint to this Board is usually filed relatively quickly. In this matter, Local 2995 complains about a work assignment situation which has been present for at least ten years, and arguably a lot longer than that. Members of Local 89 have always been assigned some of the floating work and this fact has obviously not escaped Local 2995's attention. Although Local 2995 made attempts in bargaining to obtain for its members all of the floating work, it apparently was not prepared to make a legal challenge to Spruce Falls' assignment of floating work to members of Local 89. Where the Board has a discretion to grant the relief requested, it has in other contexts determined that it would not entertain a complaint because of unreasonable delay. Delay can also impact on the nature of the relief a party might obtain. In the circumstances of this case, the Board is satisfied that the delay on the part of Local 2995 is a factor which favours maintaining the status quo.

30. The evidence called by Local 2995 indicated that Local 2995 has continually received complaints over the years from its members about Local 89 members performing their work and that, particularly of late, there has been considerable tension between the Local 2995 and Local 89 float drivers. It was argued that this situation could be remedied by granting Local 2995 the relief it requests. However desirable it is to have labour peace among employees, it is difficult to adjudicate work assignment disputes on the basis of the extent of the complaints a particular union receives from its members. With respect to the tension between Local 2995 and Local 89 members, our sense of the evidence is that the tension is more than likely caused by Local 2995 members. In any event, it is unlikely that any tension that might exist between Local 89 and Local 2995 members will be eliminated by our granting Local 2995 all of the floating work. A decision on our part to do so would not change the fact that Local 2995 float drivers would have to transport equipment to the Town garage, a location within Local 89's jurisdiction. Although the basis of the tension would be altered, a decision in Local 2995's favour would not eliminate tension between Local 89 and Local 2995 members. These factors, then, are not in Local 2995's favour.

31. The criteria which we consider to be relevant in this case do not all point in one direc-

tion. Most of the floating work is performed on the limits and it involves the transportation of equipment used by Local 2995 members. The floating operation would be more efficient if only members of Local 2995 performed the work. However, when we consider the employer's practice, employer preference, job loss and delay, these factors combined weigh heavily in favour of maintaining the status quo. After reviewing the evidence in light of the relevant criteria, the Board is satisfied that it should not exercise its discretion in favour of granting Local 2995 the remedy it seeks.

32. Accordingly, this complaint is dismissed.

2659-88-U Teamsters Local 1247 Chemical, Energy and Allied Workers, Complainant v. Victory Soya Mills, Respondent

Interference in Trade Unions - Unfair Labour Practice - Union spokesman banned from employer's premises following altercation with management - Employer willing to deal with any other union representative or this representative but off its premises - Employer not engaged in a scheme to undermine the union's bargaining position - Problems best resolved through discussion and not Board intervention

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members R. W. Pirrie and E. G. Theobald.

APPEARANCES: Eric del Junco, Ed Lymam, W. H. Mutimer, Gary L. Wesley, Joe Muyot and William Boyd for the complainant; A. D. G. Purdy, D. V. McLean and R. Strong for the respondent.

DECISION OF THE BOARD; June 22, 1989

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent employer has contravened section 64 of the Act. Section 64 reads as follows:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

2. The facts are not in dispute.

3. The union has had a collective bargaining relationship with the respondent employer for many years. In general, that relationship has been an amicable one. There is no evidence that the employer has ever indicated any overt anti-union animus, engaged in unfair labour practices, or otherwise suggested that it was not prepared to engage in the bargaining process mandated by the *Labour Relations Act*. On the contrary, the employer has not only engaged in that process for many years, without unfair labour practice allegations or assertions that it was "bargaining in bad

faith", but has also accorded the union a number of "privileges" and benefits beyond what it is obliged to provide under the terms of the statute or its collective agreement. Specifically, the company has always permitted trade union officials to conduct union-management meetings on company premises and company time. The company has always paid the wages of the employees involved in contract negotiations. The company has always paid for the full cost of hotel meeting rooms engaged for that purpose. It has no legal obligation to make such accommodations, but has done so in order to promote a constructive bargaining relationship.

4. That practice became much more selective (the union argues discriminatory) as a result of an unfortunate incident in 1985.

5. In 1985 the bargaining committees of the company and the union were involved in a very tense set of negotiations. A strike appeared imminent. A provincial mediator was appointed to assist them.

6. Bud Mutimer was spokesman for the union negotiating committee. Mr Mutimer has been the employees' union representative since 1976. A Mr. Wright (who is no longer with the company) was spokesman for the management committee.

7. During a negotiating meeting in August 1985 there was some discussion about the cancellation of an earlier scheduled meeting. As Mr. Mutimer was explaining to Mr. Wright why the meeting had fallen through, Mr. Wright called him a liar. This enraged Mr. Mutimer, who swept an ashtray off the table (inadvertently hitting the mediator in the chest) and stormed around the table demanding that Mr. Wright get out of his chair. No physical altercation actually occurred, but the meeting ended abruptly and the bargaining broke down. There is no question that, until cooler heads prevailed, there was at least the threat of a physical confrontation.

8. A few weeks later Mr. Mutimer was hospitalized with coronary disease and was unable to work for several months. Another union representative took over his duties. As before, all union-management meetings were conducted on company premises. It was "business as usual". There is no evidence of any nascent anti-union animus or attempt to hinder the employees in the exercise of their collective bargaining rights. Nor is there any evidence that the employees were ill-served by the new union representative, or that he was either under the influence of, or subject to pressure from the employer, or less aggressive than he should have been.

9. By January 1986 Mr. Mutimer was able to resume partial duties as the employees' representative, but when he went to attend a meeting at the plant he was told at the gatehouse that he had been "banned" from the premises and would not be permitted to enter. The union did not make an issue of this at the time because Mr. Mutimer was not yet fully recovered. The other union representative continued to service the Local, holding meetings on company property in accordance with past practice. Again, there is no question about the quality of employee representation provided by the substitute.

10. In January 1987 Mr. Mutimer was declared physically fit to resume full duties. Accordingly, the President of Local 1247 wrote to the Personnel Superintendent of the company advising him that Mr. Mutimer was now back on the job and would thereafter be representing the employees in all of their dealings with the company. Once again, the company refused to meet with Mr. Mutimer and refused to allow him access to the premises. The company indicated that physical threats and intimidation had no place in the collective bargaining process and that because of the earlier incident it would have no dealings with Mr. Mutimer whatsoever. However, the company stressed that it was (and still is) prepared to carry on, as before, with any *other* union representative that the employees might select or the union choose to assign. Its concerns were both personal

and specific to Mr. Mutimer. In the company's submission, his union position was quite incidental. It was not seeking a less aggressive employee advocate. It simply did not consider itself obliged to deal with someone who, in its view, had physically threatened a member of management.

11. The union filed a grievance alleging that the company's stance constituted a violation of the collective agreement. The union asserted that the company had no right to interfere with its internal affairs or to dictate who would be the union representatives on any committee. While the union did not seek to justify Mr. Mutimer's conduct in August 1985, it pointed out that it was an isolated incident in the face of provocation from the employer, and, in any event, had happened years ago. The management official in question has now left the company. Any residual personal animosity is now irrelevant. The arbitrator was urged to interpret the language of the collective agreement in a manner that was consistent with section 64 of the Act.

12. The arbitrator considered the several provisions in the collective agreement concerning union-management meetings and observed:

"The company has no right to interfere with the choice of the Union's designated representative and *must* meet with that representative for the three purposes set out in the collective agreement".

However, she went on to say:

"In my view I have no jurisdiction to order that Mr. Mutimer be granted access to the premises because they are private property, but I declare that the company is in breach of the Collective Agreement by refusing to meet with the Union's designated representative and direct that it does so hereinafter.

It would be inconvenient, time consuming, and expensive for both parties to hold all meetings off the premises, but I cannot order that the meetings be held on the premises because the Collective Agreement does not specify where the meetings shall be held. Accordingly, the company will have to determine itself whether it is in the interests of harmonious labour relations and sound business efficiency to continue its ban of Mr. Mutimer from the premises."

13. The arbitration award was released on June 1, 1987. Since that time the company has been prepared to meet with Mr. Mutimer in accordance with the arbitrator's direction, but has maintained its position (consistent with the arbitration award) that it will not meet on, or permit him access to, company premises. It will meet with any other union representative on company property; however, if Mr. Mutimer is involved, it will only discuss its employees' collective bargaining concerns somewhere else.

14. Initially, the parties met at various union halls where rooms were available free of charge; however, more recently, such accommodation has been unavailable, leaving the parties with the option of meeting in a nearby hotel. The company is prepared to pay half the cost of those hotel rooms and, as we have already mentioned, to meet anyone *except* Mr. Mutimer on its own premises as it has done in the past. The company is not prepared to permit Mr. Mutimer on the property, and quite candidly acknowledged that, but for the arbitration award, would not be prepared to meet with him at all. The company is prepared to abide, (albeit reluctantly), with the terms of the collective agreement as interpreted by the arbitrator, but, in Mr. Mutimer's case, it is prepared to go no further than that.

15. The company maintains that the board has no jurisdiction to direct how it may use its business premises nor is there anything improper in restricting access to persons who have (in the company's view) abused what was described as a "privilege". The company reiterates that there is

nothing in the collective agreement requiring it to meet on those premises or even to subsidize the rental of outside meeting rooms.

16. The union argues that this entire affair has been blown out of all proportion (a submission with which we concur) because Mr. Mutimer's outburst, four years ago, was an isolated incident, in a tense situation, for which he is now prepared to tender a written apology. The individual directly affronted is no longer even a member of the management team. The union argues that the effect of the ban is to impose upon the local union members a financial penalty if they wish Mr. Mutimer to represent them as he has done in the past. That penalty is quite specific: if the employees want Mr. Mutimer to represent them they must pay for a portion of the meeting room charges, whereas any other union representative will be admitted to the company premises "free of charge". The union argues that the company's position is intended to influence the employees' choice of advocate by exacting a financial cost if the choice is someone with whom the company is displeased. That, the union argues, is an explicit and overt attempt to interfere with the representation of employees by their union, and to send a clear message that if the company disapproves of the identity, or conduct of the employees' advocate, those employees will have to pay.

II

17. The parties argued this case as a matter of "high principle": the union relying upon the employees' statutory right to select their bargaining representative without employer interference, and the employer relying upon its allegedly inviolate property rights. Neither position is particularly useful in resolving this dispute, and both must be put in perspective.

18. We are troubled by the lack of business justification or even internal logic in the company's current stance. If the company is truly concerned about a repetition of Mr. Mutimer's inappropriate behaviour, the venue of its meetings with him should not matter very much - especially since the intemperate outburst, some years ago, of which it still complains, occurred off company premises in the first place. It is difficult to understand why an isolated incident, more than four years ago, involving a management person who has since departed, and for which Mr. Mutimer is prepared to tender a formal written apology, should cloud the current collective bargaining relationship. Indeed, a repetition of that inappropriate behaviour is probably less likely to take place on company premises now that the company has clearly indicated its position regarding such behaviour and its desire to maintain a degree of civility between employer and employee representatives. To put the matter colloquially, there is much to be said for the union's submission that this entire affair is a "tempest in a teapot" and that sound labour relations judgement has been replaced by a preference for the rules of the playground.

19. There is no absolute right of property in this country either under the Constitution of Canada, or the laws of this jurisdiction. Property rights, like other rights, are not some inalienable abstract notion, but rather a creation of law and subject to law. For example, section 103 of the Act permits the Board to authorize someone to enter an employer's premises even though such entry might otherwise have been trespassing; and in *Re Cadillac Fairview Corp. Ltd. et al and R.W.D.S.U.*, (1987) 62 O.R. (2d) 337, the Supreme Court of Ontario affirmed that, in appropriate circumstances, the Board could direct that a union be permitted access to private property if that is reasonably necessary to redress a proven unfair labour practice.

20. On the other hand, we cannot ignore the employer's basic position that, but for the arbitrator's award, it was not prepared to meet with Mr. Mutimer at all; and we have no reason to conclude that in taking that position the company was seeking to undermine the union or deprive the employees of their chosen representative. We accept the union's assertion that the company's response creates some additional expense which may, arguably, "interfere", to a minor extent,

with the way in which the union represents the employees in the bargaining unit. But that is a result wholly traceable to a personality clash - sometimes inevitable in the wear and tear of collective bargaining - rather than any desire on the company's part to control the employees' choice of union representative. And, of course, during the period when sister local unions were providing free accommodation, no complaint was made. The union's extra cost, stems, in part, from the refusal of sister unions to permit the free use of *their* property. The company's position has not changed.

21. The company's logic is weak, there is some inconvenience to the union, and this consequence flows directly from the position which the company has taken, but we are not prepared to find that the employer has engaged in any scheme to undermine the union's bargaining position. The situation here is the product of personal pique rather than premeditated plot. And, suppose a union representative does physically assault a member of management, or engage in racial slurs, or otherwise transcend the bounds of reasonable behaviour - even given the adversarial nature of the collective bargaining process. Is such conduct to be condoned or ignored, and, more importantly, is it appropriate for the Board to intrude in this area to compel a continuation of accommodations not otherwise legally required, and initially based upon amicable personal relationships rather than the law?

22. The union's position also has its weaknesses. In the first place, there is only an indirect connection to what may be described as "*rights*" protected by the *Labour Relations Act*. It is worth a moment's digression to examine the way in which that Act is structured.

23. During the organization phase, when the union is attempting to persuade employees to support it, there is no protected right to organize on company premises during working hours (see section 71 of the Act). Even after the union's bargaining rights have been established by certification, there is no obligation on the employer's part to subsidize the cost of collective bargaining by providing the union with meeting rooms free of charge, by subsidizing the wage losses of the employees involved, or by absorbing incidental costs which might otherwise be borne in equal measure. In fact, section 64 of the Act, upon which the union here relies, actually prohibits the employer from providing financial or other support to the union, and section 46(1) suggests that the use of the employer's premises or the kind of subsidies which the company here has freely given, should ordinarily be the product of collective bargaining. Thus, the paradox in the union's position is that, in reliance upon section 64, it is demanding the continuation of a form of "financial or other support" even though neither the statute nor the current collective agreement expressly requires it.

24. In essence, then, the union is demanding that the company continue to provide an *ex gratia* benefit because it has provided such benefit in the past and remains willing to continue such accommodation in a fashion which the union describes as discriminatory. Here, too, there is a certain irony. If the company had always taken an absolute position: i.e. no use of employer premises for any union representatives, no wage subsidies, and so on, it is difficult to see how the union would have any case at all. If the company had asserted all along that it was adhering to its strict legal rights under the collective agreement in respect of all of its dealings with the union, it might be hard to find fault with its position (although, as the arbitrator pointed out, that might not make much sense from a labour relations point of view). Accordingly, while we are troubled by the fact that the company has been selective in the way in which it has dealt with a particular union official, that activity has been narrowly focused, and is not tainted by any general anti-union motive.

25. We acknowledge the union's concern that an employer, by granting or withholding "indulgences" should not be permitted to undermine the independence of the employees' bargaining

agent or control the identity of the employees' representative. A withdrawal, without business justification, of accommodations previously made, with the intention or obvious effect of penalizing the employees for their choice of bargaining representative, might well breach section 64. But that is not really what has happened here. What we have before us is a simple conflict of personalities and a contest over which party will ultimately turn out to be more stubborn and short-sighted. That is not the kind of situation in which the Board, in its discretion, should be involved. Assuming, *without finding* that the company's conduct might constitute a contravention of section 64 of the Act, we would not be disposed to grant any remedy. In the particular circumstances of this case, we are satisfied that the problems raised before us are best resolved through the process of discussion and collective bargaining between the parties, and not through intervention by this Board. The matters of "high principle" raised by the parties are better addressed in a case which really warrants their consideration. This is not such a case.

2228-88-R Tish Vassair, Applicant v. Teamsters Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent v. Nedco, Division of **Westburne Industrial Enterprises Ltd.**, Intervener.

Bargaining Unit - Collective Agreement - Employee - Evidence - Termination - Union arguing that bargaining unit included a large number of temporary agency workers - **Collective agreement describing "all employee" unit - Agency workers not included on list at certification - Union never seeking to represent agency workers until termination application filed - Board determining that agency workers should not be treated as employees "in the unit" for purposes of the termination application - Relisted for hearing on issue of voluntariness of petition**

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *R. R. Montague*.

APPEARANCES: *D. Brown* and *T. Vassair* for the applicant; *Dave Watson* and *Frank Grimaldi* for the respondent; *Walter Thornton* and *B. Dodds* for the intervener.

DECISION OF THE BOARD; June 5, 1989

1. This is an application for termination of bargaining rights made pursuant to section 57 of the *Labour Relations Act*. The relevant provisions of that section are as follows:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

...

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such

time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

There is no dispute that this application is timely. Another panel of the Board has already ruled that it should be heard on its merits, even though it follows rather closely upon an earlier application which was dismissed.

2. The formula established by section 57 is relatively straightforward. The Board first determines the number of employees in the bargaining unit represented by the trade union. The Board then determines whether at least forty-five per cent of them have voluntarily signified in writing that they no longer wish to be represented by the trade union. If there is the requisite showing of opposition, the Board directs that a representation vote be taken.

3. The problem in the instant case is that first step: how many employees are there in the bargaining unit currently represented by the union? Until that question is determined the Board cannot do the "arithmetic" contemplated by section 57(3).

4. The union contends that the bargaining unit that it represents also includes a large number of so-called "agency" or "temporary" workers, who do not appear on the employee list filed by the employer in response to this application. If the union's contention is correct, and these "agency workers" are added to the list, this application must fail because the petition opposing the union - even if voluntary - would not contain the signatures of forty-five per cent of the employees in the bargaining unit. The parties are agreed that we should deal with this issue first, and turn to the question of "voluntariness" only if that becomes necessary.

5. The recognition clause in the parties' most recent collective agreement reads as follows:

ARTICLE II - RECOGNITION

- 2.01 The Company recognizes the Union as the exclusive bargaining agent of all employees of the Company's Nedco Division in Mississauga, Ontario, save and except supervisor, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period.
- 2.02 The Company agrees not to enter into any agreement or contract with its employees, individually or collectively, which in any way conflicts with the terms and conditions of this Agreement.

Article 4 may also be of interest:

ARTICLE IV - RELATIONSHIP

- 4.01 All employees on record at ratification shall as a condition of employment sign an authorization to deduct whatever sum may be so authorized for Union dues as per Article 4.04.
- 4.02 New employees shall make application for membership in the Union at the time of their hiring and shall become and remain members of the Union in good standing as a condition of employment as soon as their probationary period has been served.
- 4.03 When a new employee signs an application for membership, the application card will be forwarded to the Union office by the Company within seven (7) days from the date of employment.

- 4.04 The Company agrees to deduct monthly dues, as specified in the Union Constitution, by the first pay period of each month from each eligible employee and remit the monies so deducted, together with a list showing from whom and in what amount the deductions were made, to the Secretary-Treasurer of the Union in the current month in which the monies were deducted. The Secretary-Treasurer of the Union shall notify the Company by letter of any change in the amount of Union dues, and such notification shall be the Company's conclusive authority to make the deductions specified.
- 4.05 The Company will, at the time of making each remittance to the Union, specify the employees from whose pay such deductions were made.
- 4.06 The Company shall show the yearly monthly dues deductions on employees' T-4 slips.
- 4.07 The Union will not engage in union activities during working hours or hold meetings at any time on the premises of the Company without the permission of the General Manager or his designee.

II

6. The intervener, Westburne Industrial Enterprises Limited (Nedco Division), ("Westburne") is a supplier of electrical components. It has a permanent work force of between forty and fifty employees who are engaged in warehouse and delivery operations. In addition, Westburne uses the services of various numbers of casual workers whom it obtains from three temporary employment agencies. Those agency workers perform essentially the same tasks as Westburne's own staff, and while on the job, are under the direction and control of Westburne's supervisors.

7. The largest supplier of temporary help is a firm known as Aimco Labour Lease Inc. Aimco supplies temporary help to a number of businesses in the Metropolitan Toronto area. Aimco recruits those workers through newspaper advertisements and offers them a variety of job options. Some workers work full time, while others work only two or three days a week. It is their choice.

8. Aimco sets the rates of pay and provides for the payment of worker compensation levies, unemployment insurance, Canada Pension Plan payments and vacation pay. Aimco provides T-4 slips for taxation purposes, as well as other related employment documentation. Agency workers are paid by cheques bearing Aimco's name and drawn on its own account.

9. Aimco derives its profit from the difference between the fees which it charges its clients and the amount which it pays to the agency workers. The clients do not dictate the rates of pay nor does Aimco necessarily take into account the amounts which a client pays to its own employees doing similar tasks; however, it is conceded that, in Westburne's case, the agency employees are paid less than the sums provided in the Teamsters' collective agreement, and further that Westburne does not want Aimco to pay more than the entry rate for any given job. The reason for this is quite simple. Temporary workers who perform well may be offered permanent positions with Westburne, and Westburne wants to maintain an incentive for recruiting purposes. If agency workers do join Westburne's permanent staff, Aimco is entitled to a bonus of as much as \$1,500.00.

10. In 1988 approximately 200 persons from Aimco worked for Westburne. About seven per cent of those workers were eventually hired by Westburne on a full time basis. The average working period of an agency employee is about sixteen days, but there seems to be considerable variation. Drivers fill in on a sporadic basis to cover gaps in Westburne's regular employee complement caused by vacations, illness, injury, or temporary vacancies. Warehouse personnel work on a more regular basis.

11. When these agency workers are actually on the job, they perform the same duties as Westburne's permanent employees, use Westburne's tools and equipment, and are subject to the direction and control of Westburne's foremen. They have the same working hours and start times as Westburne's own permanent work force, and, for convenience, they "punch in" on the same time clock. Their cheques from Aimco are delivered to them at the Westburne location. However, if there are discipline or performance problems other than of a minor nature, Aimco is contacted and either takes corrective action or transfers the worker to some other job. Aimco provides no on-site supervisors at the Westburne location. On the other hand, there is no doubt that if Westburne is dissatisfied with an agency employee, that worker will be removed.

12. These facts obviously raise the question of whether the so-called agency employees are, in law, employees of Westburne rather than Aimco. The documentation and form of the relationship suggest that they are not. The direct control by Westburne's foreman, the similarity of work, and the degree of integration into Westburne's enterprise point to the opposite conclusion.

13. Counsel drew to our attention a number of cases in which the Board analyzed similar problems and set out the criteria which should be applied in determining the identity of the "real employer" of employees affected by proceedings before it. In the instant case, however, we are not persuaded that we need pursue that analysis. If the agency workers are not part of the bargaining unit in any event, it does not matter whether, in law, they are employees of Westburne. That is a legal and collective bargaining question which draws us back to the interpretation of section 57 of the Act and the terms of the collective agreement set out above.

III

14. Bargaining rights are created and can be terminated in respect of an employee grouping described as a "bargaining unit". On an application for certification it is the Labour Relations Board which fashions that unit. Subsequently, the bargaining parties can substitute their own bargaining unit description, although, typically, the bargaining unit description in the parties' collective agreement will simply mirror that determined by the Board.

15. That is the case here. The bargaining unit found by the Board to be appropriate (on the agreement of the parties) is set out in paragraph 4 of the Board's certification decision dated July 29, 1985, and now appears as Article 2.01 of the parties' collective agreement. But what does that bargaining unit description mean? Who does it encompass; and, in particular, would it encompass agency workers if, as a matter of law, they were found to be employees of Westburne? In answering this question, it is useful to consider how the parties themselves treated the matter both on the initial application for certification and afterwards.

16. When the union applied for certification in 1985, there was a dispute about the number of employees in the bargaining unit. The union had the opportunity to examine the employee list and ultimately agreed upon the number of employees in the bargaining unit. That list did not include agency workers, nor did the union suggest that it should, - even though there were agency workers present in the workplace at the time. The union was content to be certified on the basis of an employee list which excluded workers of the kind which it now says are part of its bargaining unit; moreover the evidence before us indicates that, had it taken this position on the original application for certification the result may well have been different: the Board might have either dismissed the certification application or, at the very least, directed that a representation vote be taken. Thus, if the union in the 1985 certification application had taken the position which it now takes before us, it is problematic whether bargaining rights would have been established at all.

17. Following its successful certification application, the union entered into a collective

agreement incorporating the bargaining unit language found by the Board to be appropriate. In the subsequent administration of that agreement, no one ever suggested that agency employees were part of the bargaining unit. Agency employees did not receive the wage rates stipulated in the agreement for the work that they were performing. No union dues were ever deducted for agency workers. Agency workers were never included on the seniority lists periodically provided to the union. No grievances were considered or processed on behalf of agency workers nor, until after this termination application was filed, did the union ever seriously protest the presence of agency workers in the workplace. No agency workers were invited to make application for membership in the union at the time of their hiring despite Article 4.02 of the collective agreement, and no agency employee was censured for not doing so. There is no evidence that agency workers were invited to, or did, participate in any union meeting or vote to ratify a proposed collective agreement (see sections 72(5) and (6) of the Act). In short, the union has treated the agency workers in the same way as it did on the initial application for certification: they were not included in the bargaining unit, and were not persons for whom the union sought or exercised bargaining rights. A bargaining demand to remove *the exclusion of part-time employees* from the recognition clause and prohibit the subcontracting of bargaining unit work, was advanced at the most recent round of bargaining but then withdrawn.

18. The intention of the parties is further clarified by their response to an earlier termination application.

19. In Board File No. 2427-87-R an employee, as here, filed an application seeking the termination of the union's bargaining rights. A dispute arose concerning the composition of the bargaining unit. The Board appointed a Labour Relations Officer to meet with the parties in an effort to settle that matter.

20. Two union representatives, representatives of the employees, and counsel for the employer all met with the officer to examine the employee list. The list did *not* include "agency employees", nor did the trade union representatives suggest that it should. Their agreement with respect to the bargaining unit composition is dated June 17th, 1988 and signed by the representatives of all interested parties. The agreed employee list does not include agency workers. There were agency employees working for Westburne at the time.

21. This earlier termination application was dismissed for reasons which need not be canvassed here. The fact remains, however, that, as late as a few months before the present termination application the union was taking the position that the agency workers (whose continued presence in the workplace, for years, could not have been missed), were not part of the bargaining unit.

22. We should also note that the union's reply to *this* application stated its estimate of the number of employees in the bargaining unit that it represents, and that that number approximates the group suggested by the employer: 40 employees. It was only later that the union submitted that there were as many as an additional thirty-five agency workers who should also be considered a part of the bargaining unit. It was only after the filing of this application *and* the filing of the union's initial reply that the union filed a grievance contending that the agency workers were really "employees" of Westburne and should therefore be covered by the collective agreement.

23. There was evidence put before us about the diligence of union stewards and the difficulties which they may have had concerning the enforcement of the collective agreement. It was said that the union was not doing its job. We do not think that this evidence is either accurate or particularly helpful.

24. It is clear to us that whatever the skills of the local stewards, the appointed business agents, or senior union officials, they were all abiding by what they understood to be the need to enforce the rights of employees that the union represented. But that group did not include the so-called agency workers. The union did not seek to represent them because no one believed them to be in the bargaining unit. The union did what it could to bring those workers into the union fold by proposing changes in the collective agreement, and, no doubt, those agency workers would have been better off had they been paid at "union rates", but when those collective bargaining proposals were dropped, the union was left with the status quo: agency workers were not covered by the existing arrangement.

IV

25. Ordinarily, determining the composition of the bargaining unit is a relatively simple matter. One merely looks at the description in the relevant collective agreement and compares that description to the employer's employment records. If the agreement stipulates that it covers "all employees", it means what it says, and neither bargaining party can resile from it.

26. Here, though, there is a complication, because there are many individuals who are "arguably employees" of the employer but have never been so treated by either bargaining party from the very inception of collective bargaining, and through at least two collective agreements. If the agency workers were employees of Westburne the term "employee" in article 2 of the collective agreement" might be broad enough, as a matter of abstract law, to include them; but on the evidence, we are satisfied that the bargaining parties never intended that they be included in any bargaining unit represented by the union.

27. The situation currently before us is somewhat similar to that addressed by the Divisional Court in *General Concrete of Canada Ltd. v. Local 487, United Cement, Lime and Gypsum Workers, International Union*, 1978, 78 CLLC ¶14,205. There, the union had negotiated a collective agreement purporting to cover all of the company's "employees", and a question arose as to whether the term "employee" was *intended by the parties* to include certain owner-operators. The Labour Relations Board determined that those owner-operators were "employees" for the purposes of the *Labour Relations Act*, and were, therefore, entitled to engage in collective bargaining, but the Court held that this did not necessarily mean that they were caught by the term "employee" appearing in the collective agreement. That, the Court said, depended upon the parties' intention when the agreement was signed. The Court ruled that there was a latent ambiguity in the collective agreement, that the term "employee" was not precise, and that an arbitrator should have received extrinsic evidence to determine whether the collective agreement was intended to apply to these individuals - even though, on the surface, they were employees eligible for inclusion in the bargaining unit, and a cursory reading of its terms would suggest that they were covered.

28. We think that the same problem has surfaced in the present case and that the Court's approach is instructive. Assuming (without finding) that the agency workers are employees of Westburne who might fall within the "all employee" bargaining unit described in the collective agreement, was this ever the parties' intention? In our view, the answer is no. To put the matter colloquially: the parties in this case have written their own legal dictionary. They have decided that these agency workers whose situation is ambiguous - but obviously different from that of Westburne's permanent employees - should not be treated as employees "in the bargaining unit" even if, as a matter of law there is an argument that they are Westburne's employees and therefore might fall within the scope of the bargaining unit description.

29. Having regard to the totality of the evidence, we are satisfied that despite the apparent all-inclusive nature of the bargaining unit description found in the Board's initial certificate and

subsequently transplanted into the parties' collective agreement, neither the union nor the employer ever intended that those individuals whom we have described as agency workers would be part of that bargaining unit or subject to the terms of the collective agreement. In particular, we find that the agency workers are not employees in the bargaining unit for the purposes of section 57 of the Act.

30. For the foregoing reasons this matter is relisted for hearing on the question of whether the employees' statement opposing the union represents a voluntary expression of the individuals who signed it.

31. Notwithstanding the foregoing, the Board hereby appoints a Labour Relations Officer to meet with the parties to determine whether there is any possibility of a settlement of the matters still in dispute between them.

2143-87-M Ontario Nurses' Association, Applicant v. Whitby General Hospital, Respondent

Employee Reference - Evidence - Practice and Procedure - Whether persons holding the position of "nurse manager, shift/weekend" are employees - Board asked to reassess its practice of using the application date as the evidentiary cut-off - Date of actual commencement of the examination of the first witness selected where it is a newly-created position - Broader question of whether examination date should be the cut-off point for all s.106(2) applications not addressed - Persons in this classification not employees within the meaning of the Act

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *Valerie MacDonald*, *Brenda Murray* and *C. McCluskey* for the applicant; *Lee Shouldice*, *Gaile Calder* and *Gloria Tuck* for the respondent.

DECISION OF S. A. TACON, VICE-CHAIR AND BOARD MEMBER R. W. PIRRIE; June 2, 1989

1. This is an application under section 106(2) of the *Labour Relations Act* in which the applicant is seeking a determination as to whether persons holding the position of "nurse manager, shift/weekend" are employees within the meaning of the Act. A Board Officer was appointed to conduct the examinations. The application identified seven such persons in all, namely, H. Cooper, C. Newman, L. Hadley, S. Pollock, S. Panyan, E. Crockett and M. Bell. The respondent noted that three (Panyan, Crockett and Bell) were no longer employed by March 1988, but had been replaced by Ruttan, Handford, Magill and MacIver. The parties agreed that H. Cooper and L. Hadley were representative of those persons holding the position of nurse manager, shift/weekend; accordingly, those two persons were examined.

2. It is useful at this juncture to set out the following excerpts from two decisions of the Board (differently constituted in part), dated March 31, 1988 and April 29, 1988, respectively, dealing with an issue which arose during the examinations. In the first decision, the Board ruled that the Board Officer should receive evidence up to the application date and, as well, up to the date the examination commenced.

1. A Board Officer was appointed to inquire into the duties and responsibilities of certain individuals pursuant to an application under section 106(2) of the *Labour Relations Act*. The application date was November 3, 1987. Further, examination dates were scheduled for March, 1988. During the examinations, an issue arose with respect to the date at which the evidence relating to the duties and responsibilities should be permitted or restricted. The Board Officer ruled that the evidence should be restricted to the application date. The respondent challenged that ruling and, pursuant to Practice Note No. 4, section 10, the respondent made written submissions to the Board in support of its assertion that evidence should be permitted up to and including the examination date. The applicant confirmed its position in writing, as well, that evidence should not be permitted subsequent to the application date. The Board does not regard it as necessary at this juncture to set out those written submissions.
2. In the Board's view, it is appropriate to direct the Board Officer to conduct the inquiry so as to receive evidence up to the application date and, as well, to the date on which the examination commenced. Following production of the Board Officer's report, parties may make submissions to the Board in writing or at a hearing, upon request, with respect to the appropriate date at which evidence should be permitted or restricted, as well as the merits of the employee status issue.

The Board then declined to reconsider its initial ruling, as requested by the applicant.

1. By decision dated March 31, 1988, the Board directed the Board Officer to conduct the inquiry so as to receive evidence up to the application date and, as well, to the date on which the examination commenced. Paragraph 2 of that decision continued "Following production of the Board Officer's report, the parties may make submissions to the Board in writing or at a hearing, upon request, with respect to the appropriate date at which evidence should be permitted or restricted, as well as the merits of the employee status issue."
2. The applicant has sought reconsideration of that decision in a letter dated April 27, 1988. The Board sees no utility in setting out that letter. The thrust of the letter suggests that the Board has changed its "past policy and jurisprudence" in making such a direction and addresses argument as to the merits of the policy and consequences of changing that policy.
3. Quite simply, the Board direction of March 31, 1988 did not determine the issue in dispute between the parties. Rather, as the wording in paragraph 2 of that decision makes clear, the issue is to be determined following the production of the Board Officer's report albeit in the context of that report. In the Board's view, it is preferable to determine the issue as to the appropriate date at which evidence should be permitted or restricted in the context of the facts in the instant case and where the parties are free to make submissions as to the policy implications and Board jurisprudence.
4. Accordingly, the Board declines to reconsider its decision of March 31, 1988.

3. Following release of the Board Officer's report, the respondent requested a hearing in order to make representations to the Board. As is usual where such a request is received, the matter was listed for hearing and submissions made by the parties on the various issues, including the question as to the appropriate cut-off date for evidence as to the duties and responsibilities of the persons who were the subject of the examination.

4. For convenience, the applicant, (The Ontario Nurses' Association) may be referred to as "ONA" and the respondent (Whitby General Hospital), as "the Hospital". Further, it is appropriate to briefly sketch the context of the application, a context essentially not in dispute albeit viewed from different perspectives.

5. The applicant was certified as bargaining agent on an interim basis in November 1985

ending resolution of a dispute as to whether persons classified as “nursing co-ordinator” were employees under the Act. At that time, the respondent was known as the Dr. Joseph O. Ruddy Hospital. By decision dated November 25, 1986, the Board (differently constituted) determined that a “nurse co-ordinator” was an employee within the meaning of the Act and should not be excluded by virtue of section 1(3)(b) of the Act. That decision will be discussed in more detail *infra*. Following bargaining and a reference to arbitration, a collective agreement was settled and an award issued September 25, 1987. In October 1987, the Hospital eliminated the position of nurse co-ordinator and created the new position of nurse manager, shift/weekend. An earlier attempt (in February 1987) during the statutory freeze period to end the classification of nurse co-ordinator and establish that of nurse manager, shift/ weekend prompted a complaint to the Board which was withdrawn in conjunction with a return to the *status quo*. After the expiration of the freeze and imposition of the collective agreement in September 1987, the Hospital implemented its re-organizational plan. The nurse managers, shift/weekend assumed their duties on October 21, 1987. The instant application was filed by ONA on November 3, 1987. As noted earlier, the examination commenced March 16, 1988.

6. The Board next sets out the representations of the parties in an abbreviated form. The arguments of the applicant herein summarized consist of the oral representations at the hearing plus, as desired by the applicant’s representative, the material submitted by the applicant to the Board in connection with the decisions referred to earlier; likewise, the argument of respondent’s counsel incorporates the assertions in the written material submitted earlier with the oral representations at the hearing.

7. The applicant’s representative asserted that the appropriate cut-off date for evidence as to duties and responsibilities was the application date. It was contended that use of that date was consonant with Board jurisprudence and necessary to avoid abuse by employers who could otherwise “inflate” job functions between the application date and examination date in order to secure an exclusion of the person(s) in dispute by virtue of section 1(3)(b) of the Act. Further, the potential for abuse in relying on an examination date, it was stated, was greater than the potential for abuse if the Board was forced to determine “employee” status based only on a job description. Moreover, it was argued that the application date was the most practical point at which to restrict evidence and that the same date should apply regardless of the identity of the applicant (as between employer and bargaining agent). With respect to the merits, ONA’s representative reviewed in detail the evidence dealing with the job description, work assignment, evaluations, scheduling, discipline, overtime, hiring, etc. as at the application date and cited several cases in support of her submission that the nurse managers, shift/weekend were employees under the Act. In response to a Board question, the applicant’s representative maintained that the persons were “employees” even if the examination date was utilized. The applicant’s representative declined to otherwise comment on the evidence of duties and responsibilities between the application date and the examination date. Cases referred to included: *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199; *The Doctor Joseph O. Ruddy General Hospital*, (Board File No. 2026-850-R, unreported, Nov. 25, 1986); *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84; *Peterborough Civic Hospital*, (Board File No. 1970-72-R, unreported, March 13, 1973); *Grey Bruce Regional Health Centre*, [1987] OLRB Rep. July 996; *The Corporation of the City of Barrie*, [1983] OLRB Rep. Aug. 1239; *Simmons Limited (Toronto Division)*, [1983] OLRB Rep. Dec. 2100; *Metro Windsor-Essex County Health Unit*, [1985] OLRB Rep. Aug. 1287; *Libby, McNeil & Libby of Canada Limited*, [1970] OLRB Rep. Oct. 781; *Pathe Video Inc.*, [1984] OLRB Rep. Aug. 1123; *The Burlington-Nelson Hospital*, [1971] OLRB Rep. Jan. 2.

8. Respondent’s counsel conceded that the case law utilized the application date as the cut-off point but contended that this was not without exception and that the application date was

not appropriate for reasons of efficacy, harmonious labour relations and onus of proof. Counsel stressed that the party filing a section 106(2) application need not be the party bearing the onus. That is, the applicant could “freeze” the evidence prematurely at a point prejudicial to the respondent who, in the circumstances, had the onus of establishing the person(s) in dispute should be excluded under section 1(3)(b). Moreover, utilizing a later date, it was argued, would permit the most current evidence to be placed before the Board and would more probably result in a Board determination resolving the actual dispute between the parties rather than adjudicating on an issue at an artificial point in time. The examination date would give a more accurate picture of the circumstances given the frailty of human memory and the artificiality of an “application” date as an ostensible focus of evidence. Counsel contended that the potential abuse noted by the applicant could adequately be dealt with by the Board and, indeed, the potential for abuse was less if the Board reached its determination on evidence of duties actually exercised rather than merely a job description. Counsel urged the Board to adopt a new rule regarding the cut-off point for evidence rather than merely creating an exception to deal with recently created positions on the basis that the same considerations applied to all section 106(2) applications, although the problems with the current practice were highlighted with respect to the specific category of new positions. Counsel proposed the adoption of the first date of evidence given by each person examined as the most appropriate. With respect to the merits, counsel reviewed in detail the evidence as at both the application date and the first examination date arguing that, by the latter date, the duties and responsibilities had been exercised so as to warrant an exclusion of the nurse managers, shift/weekend, given the jurisprudence, and, by the former date, the exclusion was appropriate given the job description. Virtually all of the cases cited in the applicant’s submissions were referred to and, in addition, *Kitchener Waterloo Hospital*, [1986] OLRB Rep. May 651.

9. The Board first intends to consider the merits of the application at both the examination and the application dates. In the Board’s view, this approach creates a useful context in which to evaluate the relative strengths of the parties’ positions on the “date” issue.

10. The jurisprudence dealing with section 1(3)(b) of the Act has been thoroughly canvassed in a number of cases over the years including the fairly recent decision in *J. M. Schneider Inc.*, [1987] OLRB Rep. Mar. 381. The Board does not consider it necessary to reiterate that jurisprudence at any length but, rather, affirms the principles and considerations expressed in *J.M. Schneider*, *supra*, and the cases cited therein. [See also: *Sack & Mitchell, Ontario Labour Relations Board Law and Practice*, Butterworths, 1985.] The basis for exclusion as “managerial” flows from the existence of a conflict of interest between the person(s) in dispute and the others in the bargaining unit. Criteria used to assist the Board in reaching its determination have become increasingly sophisticated, reflecting the greater complexity of modern corporate organizations in a highly technological society wherein collective bargaining now reaches into white collar and professional employee groups. In the health care field in which the instant application arises, the Board has reviewed the relevant considerations in several cases, in particular, *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84 and *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199. Two passages from the latter decision are usefully noted at this point, the first setting out the professional context and the second summarizing the caselaw:

5. In view of the circumstances of this case, and the submissions of the parties, it may be useful to refer to the jurisprudential background against which this decision is made. Although each case turns on its own facts, this is but the latest in a long series of cases where the Board has had to consider the status of registered nurses who were not primarily engaged in “hands on” nursing care, but rather were performing a variety of teaching, co-ordinating, administrative and professional functions. See *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154; *Ajax and Pickering Hospital*, [1970] OLRB Rep. Feb. 1283; *Essex Health Association*, [1970] OLRB Rep. Nov. 824; and *Toronto East General Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671. It may be useful therefore, to review the background of section 1(3)(b) of the Act, and the way in

which the Board has approached its application in the health care field. As will be seen, in a professional milieu, it is often difficult to identify and distinguish indisputably "managerial functions" as that term is used in common parlance, or in a typical office or industrial setting. The nursing professionals in a modern hospital must necessarily share the responsibility for the quality of patient care, engage in collegial modes of decision making, defer to those members of the health care team with specialized training or experience, and faithfully report conditions potentially prejudicial to the patients' welfare -- even if that implies some criticism of other members of the team. In this professional context, the "workers versus bosses" model -- with its emphasis on conflicting interests -- may underestimate the shared professional goals and responsibilities of the individuals concerned. Indeed, in the case of registered nurses, those duties may exist quite apart from the usual structures and lines of authority evident in the typical employer-employee relationship, because the nurses' conduct, judgements, and performance may be scrutinised by the College of Nurses pursuant to the Health Disciplines Act. Censure by that body can lead not just to loss of a job, but also the forfeiture of a career requiring years of training. It is hardly surprising therefore that, as a result of extensive professional training and external constraints, there is little need for the forthright front-line manager frequently found in the industrial setting. That is why it is sometimes difficult to distinguish those employees (in a common law sense) who should not be treated as employees for collective bargaining purposes. That is what section 1(3)(b) is really about.

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16. All of these cases involved individuals who, in varying degrees were performing supervisory, co-ordinating, admonitory or "quality control" functions which historically or in other contexts might have been associated with managerial status. Such functions included: co-ordinating the work of others, ensuring that the work was done properly in a technical sense, checking and correcting it where necessary, reporting or making note of errors or deviations from the prescribed medical regimen, scheduling, arranging for a "fill in" if a member of the team is absent, allowing an orderly or aide to go home a few hours early, giving an opinion of the proficiency, work habits, competence or compatibility of new or lesser skilled employees when asked to do so by a member of management, delegating or rearranging work assignments, calling in plumbers or maintenance persons to handle mechanical break-downs on "off-shifts", attempting to ensure compliance with the institutional "rules" laid down by management and admonishing or reporting an employee who did not comply, consulting with management on the running of the enterprise, and, even, on occasion, requiring an employee unfit to work to go home for the balance of the shift then reporting the incident to the director of nursing for disposition. Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, co-ordinating, training, testing, reporting, consulting and *minor* admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be "managerial functions". They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b). And in a professional context where "reporting" is part of an individual's professional responsibilities and the ultimate decisions are made by someone else (usually an "administrator" who may or may not be a professional himself) or by a group of individuals, then the "effective recommendation test" referred to above must be carefully applied. (For specific comment on employee evaluations and the need for clear evidence of their impact see: *Toronto East General Hospital*, *supra* at ¶16; *Ajax and Pickering Hospital*, *supra* at ¶17; *Mascassa Lodge*, *supra* at ¶20; *St. Peters Hospital*, *supra* at ¶7-8; *Regional Municipality of Halton*, *supra* at ¶10; and *Sudbury and District Health Unit*, Board File No. 2055-79-M decision released March 11, 1981, unreported, at paragraph 13.)

11. The Board, in reaching its findings of fact in the instant case, has reviewed the transcript of the examinations at which the parties were afforded full opportunity to question witnesses and to lead relevant evidence, both documentary and *viva voce*, in support of their respective positions. The Board has weighed and assessed all of that evidence and the documentary material filed, as noted, as at both the application and examination dates.

12. Prior to the creation of nurse managers, shift/weekend and during the certification hearing, the hospital had sought to exclude as managerial a category of persons classified as co-ordina-

tors. Interim certification was directed and a Board Office appointed to enquire into and report back to the Board on the duties and responsibilities of the nurse co-ordinators. The Board found that the co-ordinators were employees under the Act: *The Doctor Joseph O. Ruddy General Hospital, supra* (now the *Whitby General Hospital*). The duties and responsibilities of the co-ordinators may be briefly summarized as follows: in sole charge of the hospital during the shift but in frequent telephone contact with on-call senior administrative personnel; 10%-50% of time spent in hands-on patient care on a "fill-in" basis; no involvement in scheduling or patient assignment but may reallocate a nurse to another post during the shift; may call a replacement from a prepared list; essentially no involvement in the hiring, firing or disciplinary process except the authority to send a nurse home as unfit or not satisfactorily performing her duties (the evidence indicated one co-ordinator with seventeen years experience exercised the last-noted function only once); no independent authority to grant or compel overtime; long-service co-ordinators are asked for evaluations of probationary employees but the recommendations are not necessarily followed; optional attendance at regular meetings of senior nursing staff which senior team leaders (bargaining unit members) also attended. The Board's conclusion was succinctly stated at paragraph 10:

10. In the instant case, the Board is of the opinion that the effective control exercised by the co-ordinators over the employment relationship of the employees they supervise falls short of the degree necessary to make them managers within the meaning of section 1(3)(b) of the Act. By and large they operate within predetermined policies and, in any event, the Director of Nursing and other senior administrators are just a telephone call away. In contrast to nurse managers, co-ordinators do not hire or schedule. The evidence discloses that the disciplinary function of the co-ordinators is negligible. There was no evidence that their optional attendance at nursing committee meetings made them privy to confidential information relating to labour relations.

13. As mentioned earlier, the hospital eliminated the position of co-ordinator in October, 1987. The position of nurse manager, shift/weekend was created and filled as of October 21, 1987. The instant application was filed November 3, 1987. A memo dated October 19, 1987 from the director of nursing discussed the positions of nurse managers, shift/ weekend:

As of October 21, 1987 Nurse Managers - Shift/ Weekend will be responsible for the management of the Nursing Department, and will act as a delegate of Hospital Administration and as a resource to staff of other departments, during the evening, night and weekend shifts.

The attached job description clearly shows the functions for which the nurse managers - shift/ weekend will be responsible.

The following will give some elaboration on their role:

- The said Nurse Managers participate in the development, interpretation and implementation of all nursing policy and procedures, budgets and the union contract collective agreement proposal. They are responsible to attend weekly Nursing Administration committee meetings, at which all facets of nursing are discussed, i.e., - grievances, discipline, new rotations, potential new staff hirings. Often hospital wide, Board and Medical issues are discussed in order that the Director of Nursing can obtain feedback and input from all shifts. Confidential issues relating to Labour Relations requiring staff input are discussed.
- The Nurse Managers, evaluate all staff. On an ongoing basis, staff performances incidents and discipline are documented after discussion with staff. At the time of formal written evaluation, the Nurse Manager's are actively involved. Where required, disciplinary actions are expected by the Nurse Manager. Follow-up of incidents with written documentation is carried out by the Nurse Manager.
- The Administrative On-Call is a system, by which an administrative person from the hospital takes call on a rotating week by week basis. This is to allow for support if a

disaster, major fire or some other major incident occurs. The Nurse Manager participates in this on-call system.

- Grievances are received and handled by the Nurse Manager at the first step and thereafter the Nurse Manager continues to be involved throughout the grievance procedure in conjunction with the Director of Human Resources.
- They have the responsibility to decide whether probationary nurses who work significant shift and weekends are retained or terminated and to terminate if that is their decision. No staff member would be terminated in the Nursing Department without the input of the executive Director, Director of Nursing and Director of Human Resources.
- The Nurse Manager, in conjunction with the Director of Human Resources, posts for vacancies and hires staff who are on their specific evenings, or nights, or who work only weekends. In this process it is the Nurse Manager who makes the final recommendation with regards to hiring staff.
- Some direct patient care is given by virtue of the small size of the hospital and the often inability to move staff around to handle a short term emergency or patient influx, when it would be impractical to call in a staff member from home.
- Unauthorized absences would be documented by the Nurse Manager and discussed with the Director of Nursing and Director of Human Resources as is done by the Day Nurse Manager, to decide on disciplinary or other actions. Effective recommendation by the Nurse Manager with respect to disciplinary action will be endorsed by the Director of Nursing and Director of Human Resources.

"Gloria Tuck"

Director of Nursing

The major functions/responsibility section of the position description for nurse manager, shift/weekend reads as follows:

1. Ensures that nursing staff on shifts and weekends provide a level of nursing care on the units, consistent with the mission, functions and standards of care that have been set for the Department of Nursing.
2. Contributes to the development and formulation of departmental policy and procedure and collective bargaining proposals through attendance at Nursing Administration Committee and other nursing committees.
3. Recommends and implements changes in nursing practice.
4. Acts as a resource for staff members.
5. Ensures orientation of staff to shift and weekend is carried out satisfactorily.
6. Guides Agency staff when required.
7. Is accountable for that share of the staffing salary budget that is designated to shift and weekend.
8. Assists nursing staff with problem identification and resolution and communicates same to Director of Nursing.
9. Oversees the maintenance of a safe and therapeutic environment. Ensures completion of follow-up of Incident and Accident Reports for those incidents which occur on their shift.

10. Hires those nursing personnel who work predominantly on shift and weekends.
11. Responsible for disciplining nursing staff up to and including effective recommendations for termination.
12. Responsible for the Administration and enforcement of the collective agreement; including receipt of and response to grievances filed at the first step.
13. Evaluates the performance of nursing staff who work principally on shift and weekends.
14. Promotes optimum communication and understanding between the hospital and the community.
15. Acts as liaison between the nursing staff and Director of Nursing in those areas relevant to shift and weekends.
15. Responds to emergency situations as required by hospital policy and procedure. Is knowledgeable of procedure and responsibilities during shift and weekends.
16. Participates in special project areas as they are relevant to shift and weekend responsibilities (i.e., fire procedure) and as they relate to new trends in nursing practice.
17. Investigates patient/staff complaints and suggests/initiates actions for prevention of future recurrence.
18. Understands and utilizes the nursing process in areas of management. Teaches and encourages staff to use the process.
19. Participates in the management of clinical experience of students from Durham College during shift and weekend.
20. Participates in the Quality Assurance Programme.
21. Takes Administrative On-Call on a rotating basis.
22. Dispenses medications from Pharmacy according to the policies of that Department.
23. Has a significant responsibility to recognize complaints from staff and to respond to them in an effort to reduce grievances and to communicate same to the Director of Nursing.
24. Retains or terminates probationary nurses as significant to shift and weekends.
25. Performs other duties as assigned by administration.

14. The position of nurse manager, shift/weekend as depicted in the above document stands in sharp contrast to the functions of the nurse co-ordinators. Beyond the professional duties of a "supervisory, co-ordinating, training, testing, reporting and consulting" nature (to use the phraseology in *Ottawa General Hospital, supra*), the nurse managers, shift/weekend: hire those nursing personnel who work predominately on shift and weekends; discipline nursing staff up to and including effective recommendations for terminations; administer and enforce the collective agreement including receipt of and response to grievances filed at the first step; evaluate the performance of nursing staff who work principally on shift and weekends; investigate patient/staff complaints and suggest/initiate actions for prevention of future recurrence; take administrative on-call on a rotating basis; have a significant responsibility to recognize complaints from staff and to respond to them in an effort to reduce grievances and to communicate same to the director of nursing; retain or terminate probationary nurses who primarily work on shift or weekends; contribute

to the development and formulation of collective bargaining proposals through attendance at nursing administration committee and other nursing committees. The October 19, 1987 memo elaborates on the Nursing Administration Committee as a forum for discussion of grievances, discipline, potential new staff hirings and confidential issues relating to labour relations. Likewise, the memo fleshes out duties relating to evaluations, discipline, grievances, probationary nurses, hiring and unauthorized absences.

15. An assessment of the position solely based on the job description (and the related October 19 memo) would lead to an exclusion of the nurse managers, shift/weekend as "managerial" within the meaning of the statute. The precise conflicts which section 1(3)(b) was intended to avoid would be raised if the persons in dispute were employees in the bargaining unit. However, by the application date of November 3, 1987, none of the critical and few of lesser managerial functions actually had been exercised. Accordingly, the evidence of the actual performance of job duties as at the application date would not support the exclusion of nurse manager/shift weekend. In contrast, by the examination date in March, 1988, the evidence confirms the responsibilities of the nurse managers, shift/weekend did not merely exist on paper. For example, with respect to hiring, the nurse managers, shift/ weekend had carried out the entire process from posting through initial review of applications, interviews, checking references, to offering the job to the desired candidate. The hiring is conducted by the nurse manager, shift/weekend in charge of the shift the new hire will primarily be working on, regardless of whether the individual will be full or part-time. Compulsory overtime was assigned as needed and casual time off granted as considered warranted. The nurse managers, shift/weekend gave specific instructions to both nursing and non-nursing staff as needed and represented the sole supervisory personnel in the hospital during the shift. The nurse manager, shift/weekend would only contact the next level of management in the case of a major emergency or disaster, in accordance with the plans for such occurrences. The time spent performing hands-on care as "fill-in" was negligible. No formal grievances had been filed but nurse managers, shift/ weekend dealt with and disposed of numerous other complaints (between nursing staff themselves, nursing staff and other hospital personnel, etc.) in a variety of fashions. Performance appraisals are conducted annually on the individual's anniversary date; none had arisen in respect of the staff supervised by the nurse managers, shift/weekend who were examined. However the nurse managers, shift/weekend are directly responsible for those evaluations and, to that end, regularly compile anecdotal notes on the staff which are placed in the employee's file to be used for the annual review. Those evaluations (and those of probationary employees) can affect the employee's position. In at least one instance of a probationary employee, a recommendation for termination was made and accepted. Notes were also made by nurse managers, shift/weekend in respect of non-nursing employees; those notes were forwarded to the relevant supervisor and became part of the file used for the annual evaluation. The evidence indicates the notes are discussed between the relevant supervisor and the nurse manager, shift/weekend and are accepted. In summary, the Board is satisfied that, as at the examination date, the persons in dispute should be excluded as managerial within the meaning of section 1(3)(b) of the Act.

16. The Board must deal with the issue which is squarely raised in this case: should the evidentiary cut-off point be the application date or the examination date (of the examination of the first witness or the examination of each witness, as asserted by the respondent's counsel). It is useful to begin with the following excerpt from *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121:

6. It should be remembered, however that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent on any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*,

56 DLR (2d) 193.) Furthermore (and in addition to the usual rule that “he who asserts must prove”), a party seeking to alter a status quo which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

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7. We can summarize these general approaches then as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

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- (4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the “traditional foreman”, so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with “real” managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported “manager” has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.
- (5) The acceptance of the “effective recommendation test” mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide concrete examples of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a “participatory decision-making style”. Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

17. Board practice has generally utilized the application date as the cut-off: *Libby, McNeil & Libby, supra*; *The Burlington-Nelson Hospital, supra*; *Grey Bruce Regional Health Centre, supra*; *The Corporation of the City of Barrie*, [1983] OLRB Rep. Aug. 1239; *Metro Windsor-Essex County Health Unit, supra*; *Kitchener Waterloo Hospital, supra*; *Ottawa Civic Hospital* (Board File No. 1848-86-M, unreported, May 29, 1987). This is so notwithstanding that it may be the *respondent* which bears the burden of proof and has no control over the choice of application date (see, for example, *The Burlington-Nelson Hospital, supra*; *Libby, McNeil & Libby, supra*). In passing, the Board notes that one case was somewhat ambiguous as to whether the application or

examination date was used (*Simmons Limited, supra*). In two others, the parties apparently waived reliance on the application date (*Pathe Video Inc., supra* and *The Corporation of the City of Barrie, supra*, with respect to one position in dispute).

18. Despite retention of the application date, the Board has long recognized the difficulties generated thereby. That is, the Board must reach its determination on the best available evidence, however sketchy and incomplete: *The Corporation of the City of Barrie, supra*; *Metro Windsor-Essex County Health Unit, supra*; *Pathe Video Inc., supra*; *Kitchener Waterloo Hospital, supra*. This is particularly critical where the application involves individual, newly-created positions or newly-reorganized corporate structures. One very real consequence is that greater weight must be given not to *actual* examples of the exercise of “managerial” authority but to *theoretical* powers outlined in a job posting or job description: *The Corporation of the City of Barrie, supra*; *Ottawa Civic Hospital, supra*; *Pathe Video Inc., supra*. The problem of “prematurity” and the tension between actual experience and theoretical powers is discussed in the following passage from *Kitchener Waterloo Hospital, supra*:

7. Here there is a problem (unfortunately, not unique to this case): Ms. Curwood has been in her present job for only six months and may not as yet have had the opportunity to actually exercise the full range of her duties. It is not to be expected that hiring, firing, promotions, etc. will occur every day, nor in the absence of the passage of a sufficient period of time for there to have been some employee grievances or periodic rounds of collective bargaining, is it easy to say whether someone would necessarily be regularly and materially involved on behalf of the employer in these labour relations activities. The Board has never shrunk from its obligation to render the opinion required of it under section 1(3)(b) of the Act, but in circumstances where the individual is occupying a new job the Board has frequently warned the parties their request for its opinion may be premature and may not be determinative. An opinion based upon incomplete information or experience may not provide a final resolution of the parties' concerns and may simply generate another reference under section 106(2) when there is a sufficient body of experience to make a more accurate assessment. That is why the Board, through its officers, frequently advises parties to wait before seeking the opinion of the Board under sections 106(2) and 1(3)(b) of the Act. Moreover, section 106(2) of the Act recognizes that business organizations and managerial structures can change over time. Jobs evolve. Functions which attract the concern to which section 1(3)(b) is directed may, in practice, be added or deleted from an employee's regular duties even if there is no formal change in his job description. In the Board's experience, a written job description can sometimes be a quite misleading indication as to what the employee actually does from day to day but until there is a body of experience with which to compare it, it may be all there is - particularly for new jobs or new incumbents.

Further, in *The Corporation of the City of Barrie, supra*, the Board observed that:

6...As the Board has said in the past, its task is to attempt to assess the actual (as opposed to theoretical) duties and responsibilities assigned to a particular individual, together with the extent, if any, of that person's authority. If the only evidence before the Board is that that individual has at some point been advised that he has certain authority, or has been presented with a job description outlining such authority, that evidence may, in a given case, be insufficient to establish the actual existence of such authority or responsibility. This might be so, for example, where there is contradictory evidence suggesting the contrary, such as the person's relative position in the hierarchy of the organization, or what the actual practice in the work place has been. A party seeking to justify an exclusion where none has existed before must be conscious of the evidentiary onus upon it, as discussed at length in *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1153. The newer the position, and the lower the level, the more difficult it may be for a party to meet that evidentiary onus. Particularly where the demarcation line between management and the bargaining unit has never been clearly drawn, and the authority of a first-line supervisor rests upon the individual's ability to make “effective recommendations”, a period of time may have to elapse before anyone is in a position to determine whether the individual's recommendations are generally “effective”. On the other hand, a newly-appointed “manager” need not be shown to have fired a fellow member of the bargaining unit before the Board can be satisfied that the person is in fact a manager. That is not a position

which the members of the bargaining unit would likely wish their trade union to adopt before the Board, and indeed it is not a position which the trade union has specifically urged upon us in the present case. In addition, the overall organizational structures of the employer may leave no doubt, having regard to the existing line of managerial authority, that a newly-created position falls above that line. Unequivocal evidence of reporting lines may, in such cases, provide a convincing substitute for specific acts of hiring, firing, etc., which often times will take place at a more subordinate level of management.

Finally, in *Sudbury Algoma Hospital* (Board File No. 0078-81-M, September 22, 1981), the Board commented:

3. The present case is not without difficulty for the Board, having regard in particular to the fact that the Board is called upon to assess a newly-created position. As the Board stated in *Sudbury & District Health Unit*, (unreported), Board File No. 2055-79-M, released March 11, 1981:

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient that an individual has "paper powers" contained in a job description, or a "managerial" job title, if managerial functions are not actually exercised. Of course, if the challenged individual has been recently promoted, or the disputed position recently created, the full range of managerial powers may not have been exercised by the time the matter comes before the Board. In the former case, some assistance can usually be gleaned from the duties and responsibilities of the previous incumbent; while in the latter case, the application may simply be premature.

Particularly where the managerial authority consists of the ability to make "effective recommendations", a lack of actual experience in that regard makes it difficult for the Board to assess the degree of "effectiveness" of those recommendations.

19. The instant case dramatically illustrates the problems just noted. The application date followed by a mere nine days the creation of the position of nurse manager, shift/weekend. By that date, not unexpectedly, there was minimal evidence of "managerial functions" having been exercised. While the job description grants ostensible "managerial" authority, the evidence of actual performance of duties and responsibilities at that point would not sustain their exclusion. By the examination date over four months later, however, there had been ample opportunity to assess whether mere paper powers or actual authority had been bestowed on the nurse managers, shift/weekend. The evidence conclusively established the authority was real and had been exercised.

20. In deciding whether to depart from its past reliance on the application date, the Board must consider the various arguments for retention of that date. The representations related to certainty and prevention of abuse. Certainty as to the point at which the evidence and issues must crystallize is neither an absolute virtue nor does it reflect the locus of the burden of proof. Normally the applicant bears the onus (except as otherwise specifically directed by the Act) and, thus, it is usually appropriate to leave to the applicant the choice of date at which the issue is joined and evidence to be adduced. In section 106(2) applications, however, it is the party seeking the exclusion which bears the onus, regardless of the identity of the applicant. Further, if another date were selected in lieu of the application date, that date would become "certain" and whatever other merits the "certainty" argument had would apply equally to that "certain" date. There is nothing in the wording of section 106(2) itself which requires reliance on the application date; the choice, although it should reflect labour relations realities and enable the Board to discharge its statutory duty of determining the "employee" (or "guard") status of the person(s) in dispute, is for the Board. Section 106(2) applications, thus, stand in contrast to certification applications wherein the Act does stipulate that the application date must be utilized to ascertain the number of employees

in the bargaining unit (section 7(1)). In that regard, where the determination of the employee status of an individual is critical to the certification process (i.e., in connection with the bargaining unit description or determinative of the outcome of the application given the level of employee support), the Board must decide that issue and must do so as at the certification application date. However, where such determination is not critical to the outcome of the certification application, the Board issues a final certificate and permits a section 106(2) application to be brought should the parties be unable to resolve their dispute through negotiations: *Robin Hood Multi Foods Inc.*, [1985] OLRB Rep. July 1159. One practical consequence of this development in the jurisprudence is that questions of "employee" status, except where unavoidable, are detached from the certification application (where the relevant date is dictated by statute) to a more appropriate point in the parties' bargaining relationship. This evolution in the jurisprudence enhances arguments in support of a date which is appropriate for determining issues of "employee" status in terms of the parties' relationship, rather than a point chosen by one party without regard to what makes labour relations sense.

21. The second argument for retention of the application date is that potential abuse of the process will be prevented if employers do not have the opportunity to "puff-up" the job functions of the person(s) in dispute between the application and the examination date in order to secure their exclusion. In the Board's view, this concern cannot withstand careful scrutiny. As the cases have discussed, where there is little opportunity for evidence of actual duties because the application date closely follows the creation of a position, the Board must place increasing reliance on the job description. Yet the Board has been properly reluctant to view the ostensible authority outlined in a job description as determinative and the jurisprudence stresses that the status determination should reflect the actual exercise of authority, not paper powers. The freezing of the evidence at the application date, however, reduces the likelihood of a determination which accords with the actual job authority. Such approach is not to be commended. Moreover, given that the job description may assume critical importance in such instances, use of the application date may *encourage* abuse by employers as it is far easier to concoct a job description on paper which would result in the exclusion of the person(s) in dispute than to manipulate the actual exercise of managerial duties sufficient to warrant exclusion. It is also far easier to detect (through the evidentiary process) a "sham" position if the Board is in a position to focus on the *actual* exercise of job functions.

22. Throughout, the Board has referred to the "examination" date as the alternative. In fact, the respondent's counsel asserted the date the examination of each witness commenced was most appropriate. Viewed solely from a "most current evidence" perspective, other dates might be considered as well, such as, the conclusion of the section 106(2) enquiry or the conclusion of the examination of each witness. The Board is not persuaded that the adoption of the conclusion of the section 106(2) enquiry or the conclusion (or even the commencement) of the examination of each disputed person and/or other witnesses is feasible or desirable. In the Board's view, although the most current evidence of duties and responsibilities may well be the "best evidence" in one sense, those alternatives would generate numerous procedural and substantive problems. For example, parties undoubtedly would wish to recall earlier witnesses in order to counteract evidence given in respect of a point in time subsequent to the previous witnesses' testimony. Proceedings would become interminable as one or other party would seek to prolong matters to lead yet more recent evidence in support of their respective positions. Thus, the alternatives noted perhaps are theoretically pure models but present substantive and practical difficulties and create procedural uncertainty.

23. The Board regards the date of the actual commencement of the examination of the first witness as a feasible alternative which balances the various competing interests. Such date would be set by the Board where the Board itself conducts the examination or by the Board Officer

appointed to conduct the examination. Commonly, examinations commence some months after the application date given the exigencies of the Board's schedule and that of the parties but are completed relatively soon thereafter. Reliance on the first examination date as the cut-off for evidentiary purposes would adequately respond to the problems of "prematurity" discussed earlier by providing an adequate period of time in which to assess the actual duties and responsibilities of the person(s) in dispute. ["Prematurity" connotes not just the difficulty created by the forced reliance on "paper" authority rather than evidence of actual exercise of duties but, in addition, the prospect of a fresh section 106(2) application once there had been adequate opportunity for the exercise of job functions. That is, the Board's initial determination would not conclusively resolve the dispute between the parties.] Concomitantly, concerns flowing from the location of the burden of proof and the identity of the applicant would be addressed. Given that the Board would set the first examination date, the parties would not be tempted to "jockey" for dates perceived to be of advantage (although in the Board's opinion the possible "advantage" of such conduct would be minimal). However, where the parties want a consent adjournment to specific other dates or on a *sine die* basis in order to seek a resolution of the dispute without litigation, the use of the date the first examination actually commenced would ensure the Board had current evidence on which to base its decision on the status of the disputed individual(s) without penalizing agreements of the parties and/or efforts to settle. The Board need not reiterate its assessment of the relative potential for abuse as between the application date and the examination date; that has been dealt with above.

24. One other argument in support of the examination date has not yet been addressed. The application date is an entirely artificial point in time without reference to the parties' collective bargaining relationship or the jobs of the person(s) in dispute. Given the frailties of human memory, it is virtually impossible for an individual to recall with any degree of accuracy what functions may have been exercised some months earlier where the relevant point in time is so arbitrary (from the perspective of the witnesses). In contrast, the examination date is far more immediate and, thus, would be expected to generate more reliable evidence on which the Board can fulfill its statutory mandate. In the instant case, for example, the transcript is replete with responses revealing the considerable uncertainty of the witnesses (testifying in late March, 1988) as to whether particular job functions had actually been exercised prior to November 4, 1987 (as the application was filed November 3) whereas the witnesses were certain as to whether the specific duties had been exercised at all.

25. In summary, for evidentiary purposes, the Board regards the selection of the examination date (i.e., the day on which the examination of the first witness actually commences) as the optimum point which balances the various labour relations considerations involved. That date provides a measure of certainty without thereby creating a problem of prematurity. Any dissonance between the location of the burden of proof and the identity of the applicant is ameliorated. The Board's determination of the status issue can reflect the *actual* exercise of job responsibilities rather than *ostensible* authority and, in consequence, reduce the likelihood of abuse by employers. The use of a date more proximate than the application date eliminates the impact of the latter arbitrary date on the witnesses' memories and, hence, generates more reliable evidence. The examination date as cut-off also readily accommodates parties' consent adjournments and settlement efforts and still provides current evidence on which the Board can make an assessment of status. Counsel for the respondent submitted that the examination date should be adopted as the evidentiary cut-off point for all section 106(2) applications. In the Board's view, the instant application involves a newly-created position and the Board's analysis addressed those circumstances. The broader question need not be resolved in the context of this application.

26. For the foregoing reasons, the Board finds that the evidence of duties and responsibili-

ties actually exercised by the nurse managers, shift/weekend during the period up to the examination date is such as to warrant their exclusion as managerial within the meaning of section 1(3)(b). Accordingly, nurse managers, shift/weekend are not employees under the Act.

DECISION OF BOARD MEMBER KAREN S. DAVIES; June 2, 1989

1. It is my opinion that it is wrong to use the examination date as the cut off date rather than the application date for evaluating the evidence of job duties. The merits of this specific case do not warrant such a departure from the Board's normal practice of determining duties and responsibilities as of the application date.

2. In my view, on all the evidence, the individuals at issue were properly included in the bargaining unit on the date of the application. I find support for this in the majority decision. It would not have been necessary for the majority to go on to depart from such a well established line of earlier cases.

3. On November 3, 1987 a question was referred to the Ontario Labour Relations Board ("the Board") by the Ontario Nurses' Association ("ONA") as to whether "a person" is an employee. Under the jurisdiction granted by section 106(2) of the *Labour Relations Act* ("the Act") such a question may be referred to the Board for a final and conclusive decision. Further, such a question may be referred if it arises, as is the case here, during the period of operation of the collective agreement.

4. It is helpful to set out the provisions in the Act. Upon close scrutiny of the words of the statute, it is my respectful view that it is here that the majority has made the mistake that prompts my decision. The section is as follows:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) *If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board #4 thereon \$4 is final and conclusive for all purposes.*

(3) Where the Board has authorized the chairman or a vice-chairman to make an inquiry under clause 103(2)(h), his findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he may, if he considers it advisable to do so, reconsider his findings and conclusions on facts and vary or revoke any such finding or conclusion. R.S.O. 1980, c.228, s.106.

[my emphasis]

5. Certainly it is section 106(2) that has the most direct bearing on this case. However, it must not be lost sight of that the Board's jurisdiction to answer this question referred to us is laid out in the same section that provides our general grant of jurisdiction from the Legislature. We may only do what the Legislature has seen fit to have us do.

6. In the case before us we have certain authority. To paraphrase section 106(2) for the purpose of this case, we may decide the question referred to us provided the question arose during the period of operation of a collective agreement and the question is one of whether a person is an employee.

7. We are not making a decision about what categories or classification of employees are excluded from the bargaining unit (see *Royal Ontario Museum*, [1983] OLRB Rep. Aug. 1361). That is a certification matter or a matter for negotiations between the parties. We have no authority here to alter the collective agreement. However, clearly any decision we make regarding the status of a person or persons may assist the parties in general terms where other persons have the same status or classification.

8. In my view, the majority has erred in that the majority has answered a different question than the one referred to us. The question that we *may* answer is the one that arose during the period of the collective agreement and was subsequently referred to us. The question that arose during the period of the collective agreement is whether a person *is* an employee, not whether that person has ceased to be or has become an employee by the time a Labour Relations Officer (“LRO”) commences conducting an examination. The majority has assumed a jurisdiction not afforded to them and answered a question which was not directed to them.

9. The “choice” of whether to use the application date or the examination date is not one that “is for the Board”. The wording of section 106(2) most certainly does require reliance on the application date since that is the date on which *the question* is referred to us for final decision. Our task here is not to balance the various competing interests but to answer a simple question that has been referred to us.

10. Reflection is in order regarding the tripartite nature of the Ontario Labour Relations Board. The reasons of the majority in this matter raise an issue which can only be of grave concern to the labour relations community, both union and management alike. That issue is the unilateral reversal of well established Board jurisprudence by the majority’s decision issued in a single case such as this. The problems and concerns so thoughtfully addressed by the majority in this matter are not new to the Board. The central core of the majority’s concern is how to deal with premature applications. The possible prematurity of an application is a risk taken by any applicant. The expressed concern that early applications may lead to multiple proceedings must be related to the Board’s practices and procedures. Unless there are new and different job duties raised in a subsequent application it will be treated similarly to a reconsideration with the attendant restrictions (see *Cochrane Temiskaming Resource Centre*, [1983] OLRB Rep. Feb. 222 and *Windsor Star*, [1988] OLRB Rep. Apr. 427, paragraph 14).

11. The problem of prematurity has troubled the Board in the past and has resulted in equally thoughtful if less interventionist responses such as is found at paragraph 7 of *Kitchener-Waterloo Hospital*, [1986] OLRB Rep. May 651:

7. The difficulty in the present case is not in establishing the appropriate indicia, which, if present, would establish that the disputed individual should be excluded from the bargaining unit either on a “managerial” basis or “confidential/labour relations” basis. The problem here is to unravel the testimony and determine whether Ms. Curwood’s duties actually bring her within the above-mentioned parameters. *Here there is a problem (unfortunately, not unique to this case): Ms. Curwood has been in her present job for only six months and may not as yet have had the opportunity to actually exercise the full range of her duties.* It is not to be expected that hiring, firing, promotions, etc. will occur every day, nor in the absence of the passage of a sufficient period of time for there to have been some employee grievances or periodic rounds of collective bargaining, is to easy to say whether someone would necessarily be regularly and materially involved on behalf of the employer in these labour relations activities. The Board has never shrunk from its obligation to render the opinion required of it under section 1(3)(b) of the Act, *but in circumstances where the individual is occupying a new job the Board has frequently warned the parties their request for its opinion may be premature and may not be determinative.* An opinion based upon incomplete information or experience may not provide a final resolution of the parties’ concerns and may simply generate another reference under section 106(2) when there is

a sufficient body of experience to make a more accurate assessment. That is why the Board, through its officers frequently advises parties to wait before seeking the opinion of the Board under sections 106(2) and 1(3)(b) of the Act. Moreover, section 106(2) of the Act recognizes that business organizations and managerial structures can change over time. Jobs evolve. Functions which attract the concern to which section 1(3)(b) is directed may, in practice, be added or deleted from an employee's regular duties even if there is no formal change in his job description. In the Board's experience, a written job description can sometimes be a quite misleading indication as to what the employee actually does from day to day, but until there is a body of experience with which to compare it, it may be all there is - particularly for new jobs or new incumbents.

[my emphasis]

12. It is for the parties to determine when they will seek the opinion of the Board see *Town of Whitby*, [1987] OLRB Rep. June 937, paragraph 7, at page 943; *OSSTF*, [1980] OLRB Rep. Mar. 348; *Corporation for the City of Barrie*, [1983] OLRB Rep. Aug. 1239, at paragraph 5, page 1241; *Pathe Video Incorporated*, [1984] OLRB Rep. Aug. 1123, at paragraph 5, page 1124. It is clearly established in the Board's jurisprudence that the application date is the date that the Board will use unless the parties agree otherwise. In *Libby, McNeil and Libby*, [1970] OLRB Rep. Oct. 781 at paragraph 2:

The Board denied the Respondent's request to adduce further evidence on the grounds that the Board looks at the duties and responsibilities of the persons in dispute as of the date an application is made, which date in the instant case was June 24, 1970. When dealing with duties and responsibilities the Board is aware that the duties and responsibilities of an individual employee are always subject to change. If the Board attempted to make a determination with respect to an open-ended situation, the Board's proceedings in certain cases would be interminable in view of the fact that changes are constantly being made. The Board therefore makes its determination of the duties and responsibilities of disputed persons as of the date the application is made. The Board's determination in this case is therefore made as of June 24, 1970, the date the Board received the Union's application.

That position has been repeated time and time again. Sound reasoning for the Board's established jurisprudence on the date of application is also found in *Grey Bruce Regional Health Centre*, [1987] OLRB Rep. July 996, paragraph 7, "Consistant use of that date permits all parties to assess their position and acquire necessary evidence in the most expeditious manner possible."

13. In addition, a departure from this well established approach may well create new and equally troublesome issues, for example, a dispute as to what properly constitutes a newly-created position. Such a departure tends to confuse the law by utilizing one of two different cut-off dates for evidentiary purposes depending on the position when making a determination under section 1(3)(b) of the Act.

14. It is my firm opinion and a dictate of common sense that it is unreasonable to assert that a majority of one panel can proclaim a new rule. That new rule is that in 106(2) applications involving newly-created positions the Board will adopt the date of examination for evidentiary purposes. Such changes which have a great impact upon and catch the labour relations community by surprise reflect poorly on the Board's credibility and its ability to provide consistant direction to that community. Where such a change is to be made it ought to be done through a procedure which gives notice to the entire labour relations community and enables all parties to commence a proceeding on level ground. Over the years the Board has developed and published various Practice Notes on this basis and for the reasons expressed. The majority in this case has no more or less ability to bind future panels than it itself feels bound by the Board's earlier decisions. To disregard such a long line of decided cases rather than deal with the circumstances of the specific case before

us in accordance with the earlier cases invites chaos and will lead to uncertainty in this and other areas of the Board's concerns.

15. It is important to note that even the respondent's argument clearly acknowledged the well established jurisprudence of the Board and restricted its argument for departure specifically to this case based "on the circumstances of this case". The respondent's argument was not directed to a broader departure until the issue was raised by the panel.

16. Concern was raised in the union's argument that the use of the examination date will invite abuse by employers. I agree. If the employer (who has the power to initiate such mischief) has until the examination date to put its house in order it will do so. An example of this mischief can be found in *Ontario Secondary School Teachers' Federation*, [1980] OLRB Rep. Mar. 348, at paragraph's 6 and 7:

6. The respondent is the designated collective bargaining representative for Ontario's secondary school teachers. Ms. Hunnius has been employed by the respondent, in various positions, since February, 1972. In or about June, 1979 she was advised that her position of "information officer" was being eliminated and that she would be offered continued employment in a newly-created position entitled "Research Officer." The Research Officer would report to Dr. Lecuyer, the associate general secretary of the respondent; however, no firm determination had been made concerning the duties and responsibilities associated with the new position. It was expected that the job would "evolve" and would be subject to an on-going, functional review. When Dr. Lecuyer gave his evidence, in December, 1979, he explained that the position was still largely an undeveloped concept. He envisaged various responsibilities, which might be undertaken by the Research Officer, but he candidly indicated that his views were somewhat speculative, and based upon his own view of the respondent's needs. *The position was still in a state of flux, almost six months after its creation. It is clear, however, that prior to the present application there was no affirmative decision taken to employ the "Research Officer" in a confidential capacity in matters relating to labour relations.* Ms. Hunnius had not been specifically so advised, although she had raised the matter at a meeting with Dr. Lecuyer, Ken McLaren, the respondent's Personnel and Office Manager and Mr. Richardson, the respondent's General Secretary.

7. *Ms. Hunnius was appointed to the disputed position in or about July 1st. Thereafter, she undertook various assignments, including an appraisal of a British study comparing teachers' salaries with those of civil servants. The present application was filed on September 12th, 1979. By letter dated September 14th, 1979 the Registrar of the Board advised the respondent of the application. On September 19th, 1979 Ms. Hunnius was given the first assignment which, the respondent now contends, demonstrates that she is employed in a confidential capacity relating to labour relations. A Labour Relations Officer was appointed on October 29th, 1979 and a hearing before the Officer was scheduled for November 19th. On November 9th, 1979 the respondent produced its first formal job description, which was eventually presented to the parties herein at the hearing before the Officer on December 5th, 1979.* This sequence of events illustrates the principal difficulty faced by the Board in cases such as this. The Board is asked to make a determination of employee status in a dynamic situation based upon evidence which can be neither complete nor conclusive.

The change to date of examination would not only encourage such mischief but also deem it permissible leaving the trade union without a remedy.

17. I would have denied the respondent's request to adduce further evidence based on the Board's well established jurisprudence. My determination would have been on the duties and responsibilities as of the date of application, in the instant case, November 3, 1987 and concluded that the individuals were properly included in the bargaining unit.

2455-87-R International Union of Operating Engineers, Local 793, Applicant v. Wraymar Construction and Rental Sales Ltd., Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Board looking at issue of how s.117(b) applies to the issue of which employees should be included on the list of employees - S.117(b) not dictating that off-site shop employees must be included in any particular unit - Designation order requiring that both on and off-site mechanics be included in an operating engineers unit

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

APPEARANCES: *S.B.D. Wahl* and *A. Luchak* for the applicant; *Joseph Liberman* and *Margaret Gurney* for the respondent; *William Challis* and *James Devereux* for the objectors.

DECISION OF THE BOARD; June 19, 1989

1. At this stage of this proceeding, the Board must decide whether it is appropriate to use the *Gilvesy* test to determine which persons should be included in an operating engineers' construction industry bargaining unit for purposes of the count in an application for certification made pursuant to section 144(1) of the *Labour Relations Act*. In doing so, the Board must examine the effect, if any, of section 117(b) on such determinations.

2. The operation of businesses and the nature of employment in the construction industry are unlike those in other industries (see *Smiths Construction Company*, [1984] OLRB Rep. March 521; *J. A. Willes*, *The Craft Bargaining Unit*, Industrial Relations Centre, Queens University, 1970); *G. W. Adams*, Q.C., *Canadian Labour Law*, (Canada Law Book Inc., Aurora, 1985) at pages 863 to 893; *Arlington Crane Service Limited et al. v. Minister of Labour and The Attorney General of Ontario et al.* (1989) 67 O.R. (2d) 225). Many construction industry employers arrange their affairs so that they employ persons in one or more specific trades or crafts to do the work of that trade or craft as required. The nature of employment in the construction industry, which has developed in part as a result of the manner in which construction employers tend to operate, has been partly responsible for the development of construction crafts or trades, and for the concomitant development of construction trade unions along craft or trade lines. In recognition of this, the *Labour Relations Act* and the Board approach construction industry applications for certification differently from non-construction applications.

3. Section 6(1) of the Act gives the Board a discretion in determining "the unit of employees that is appropriate for collective bargaining". In applications for certification relating to the construction industry, that discretion is limited by sections 6(3), 119, 139, and 144 of the Act.

4. All applications for certification in the construction industry are made pursuant to sections 119 and 144 (see *Clarence H. Graham Ltd.*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Ltd.*, [1983] OLRB Rep. March 407 and July 1104). Under the province-wide bargaining provisions of the Act, there are organizations of trade unions, referred to as designated employee bargaining agencies, which are designated to represent in bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry those employees in certain specified trades or crafts who are represented by the trade unions, referred to as affiliated bargaining agents, which constitute them. A trade union which is an affiliated bargaining agent represented by a designated employee bargaining agency may, at its option, apply for certification under either section 144(1) or (3), or enter into

voluntary recognition agreements under section 144(4). Trade unions which are not represented by a designated employee bargaining agency, and are therefore not affiliated bargaining agents to which by sections 144(1) through (4) of the Act apply, such as the Christian Labour Association of Canada, can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

5. For the trade unions to which they apply, the designation orders issued pursuant to section 139(1) describe the provincial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and designate, for each such provincial bargaining unit, an employer and employee bargaining agency. In effect, such orders designate the trade(s) which “belongs”, for purposes of the province-wide bargaining scheme, to each employee bargaining agency and its affiliated bargaining agents. Employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (see *Ninco Construction Ltd.*, *supra*; *Manacon Construction*, *supra*; *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Ltd.*, [1987] OLRB Rep. Oct. 1228). In fact, the structure of the Act *requires* an employee bargaining agency to represent all parts of the trade(s) it has been designated to represent in ICI bargaining. Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe an ICI sector bargaining unit in a manner which is inconsistent with the relevant designation order. To accommodate this designation system, and recognizing that trade union representation in the construction industry has historically been along trade or craft lines, the Board’s general practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the relevant designation order. Indeed, the Board has held that where (as in this case) a trade union seeks to be certified for a bargaining unit limited to a particular craft or trade (as any affiliated bargaining agent must in an application which relates to the ICI sector of the construction industry), all employees pertaining to that craft or trade who are at work on the date of application must be included in the bargaining unit for certification purposes (see, for example, *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924).

6. Once the appropriate bargaining unit has been determined, the Board must, before it can dispose of an application for certification, determine the number of employees in it, and the number of those employees who are members of the applicant trade union at the material time (section 7(1) of the Act). In order to accommodate the unique nature of employment in the construction industry, the Board’s approach is to take a snapshot of the business and employees of a construction industry employer with respect to which it has received an application for certification. While the date of application has always been important in that respect (see *Smiths Construction Co.*, *supra*), the Board’s approach has (relatively) recently become even more focused on that date (see *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220).

7. The applicant is an affiliated bargaining agent of a designated employee bargaining agency; namely the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers. That employee bargaining agency has been designated, pursuant to section 139(1) of the Act, to represent in bargaining “all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors” represented by its various affiliated bargaining agents in the ICI sector of the construction industry.

8. By decision dated February 26, 1988, the Board, (differently constituted) found, at paragraph 9, that:

...all employees of the respondent engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry, save and except the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), [that is, in Board Area 6] save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

(We note that this determination was made prior to the release of the Board's decision in *Kraft Construction Company, (1978) Limited*, [1989] OLRB Rep. Feb. 169).

9. Because of the designation order and the description of the bargaining unit which the Board has found to be appropriate, those persons employed by the respondent in the ICI sector or in any other sector of the construction industry in the geographic area referred to in the bargaining unit description who are primarily engaged in the repairing or maintaining of cranes, shovels, bulldozers and similar equipment (hereinafter "mechanics") must be included in the bargaining unit. The question is whether this applies to both on (construction) site and off (construction) site mechanics.

10. In *E & E Seegmiller Limited, supra*, the Board reviewed, at paragraph 12, its then existing practice with respect to determining who is an employee in the bargaining unit for purposes of applications for certification in the construction industry:

In applications for certification in the construction industry, a person must be at work for the respondent employer on the date that the application is made in order to be included in the bargaining unit for the purposes of "the count" (see for example *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. Mar. 521 among others). In addition to actually being at work, the employee must have spent a majority of his time on the date of application doing bargaining unit work (see for example *O. J. Jaffrey Limited*, [1964] OLRB Rep. Aug. 233; *Clairson Construction Company Limited*, [1968] OLRB Rep. April 126; *George and Asmussen Limited*, [1971] OLRB Rep. Oct. 683 among others). Where an employee was doing the work of one trade or craft on the date of application but prior thereto had been engaged in doing the work of several trades or crafts at the same wage rates, the Board has long been willing to examine a period of time prior to the date of application that is representative for purposes of ascertaining what work the employee spends the majority of his/her time doing and so determine whether or not that employee should be included in the bargaining unit. The length of this "representative period" has heretofore varied on a case by case basis (see for example *Heath Construction Inc.*, [1977] OLRB Rep. 691; *J. M. Chartrand Realty Ltd.*, [1978] OLRB Rep. May 423; *Di Marco Plumbing & Heating Company Limited*, [1985] OLRB Rep. May 659; *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1793 among others). It has also been suggested that the Board may look to the primary reason for which the employee was hired in order to determine his/her classification (*Pre-Con Murray*, [1965] OLRB Rep. Jan. 1003) but this test has largely been used in the circumstances where the evidence of what the employee actually did does not answer the question of whether the employee should be included in the bargaining unit (see for example *Des-Build Developments Limited, supra* and *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924). In summary, the Board has looked at the following criteria in making its determinations:

- (a) whether the person concerned was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application; or

- (c) where, previous to the date of application, the person has been engaged in the work of more than one trade or craft and the work s/he performed on the application date does not accurately reflect the work s/he normally spends the majority of his/her time doing, the work done by that employee during the appropriate representative period prior to the date of application; or
- (d) where there is inconclusive evidence with respect to the work in which an employee has been engaged, any other relevant factor, including the primary reason for hire.

(See also *Gilvesy Enterprises Inc.*, *supra*, at paragraphs 16 and 17). The Board went on, at paragraph 23, to state that:

... However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" had tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

(See also *Gilvesy Enterprises Inc.*, *supra* at paragraph 21).

11. Since then, the Board has consistently applied the tests suggested in *Seegmiller*, *supra* and *Gilvesy*, *supra*, and, for the purpose of applications for certification in the construction industry, has determined that employees must have spent a majority of their time on the date of application performing work in a trade or craft to which the application relates as an employee of the respondent employer. In applying the *Gilvesy* test, as it has come to be referred to, in *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976, the Board noted that:

The tests suggested in *E & E Seegmiller*, *supra* (and *Gilvesy*, *supra*) have been consistently applied by the Board since those decisions issued. It is evident that the purpose for looking to other criteria when there is no conclusive evidence with respect to the work being performed on the date of application is to determine whether it is more probable than not that the individual in dispute was an employee in the bargaining unit on the date of application. The fact that "primary reason for hire" was specifically mentioned in *E & E Seegmiller*, *supra* (and in *Gilvesy*, *supra*) does not mean that that factor will necessarily be any more (or any less) significant in any given case. It is merely an example of what the Board will consider to be a relevant factor. It is

unnecessary, and probably inappropriate (and impossible), to try to set out any exhaustive list of facts that the Board will consider to be relevant. What factors are relevant, and what weight is to be given to any relevant factor, will depend on the circumstances of each case. We also observe that in *E & E Seegmiller, supra* and *Gilvesy, supra*, the Board was concerned with on-site employees only. Clause 117(b) of the Act contemplates that off-site employees who are commonly associated in their work or bargaining with on-site employees will be included in a construction industry bargaining unit and a "work done on date of application test" does not seem to be suited to resolving disputes with respect to off-site employees (see *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. Apr. 364).

In this case, the Board must address the issue raised in *Runnymede Development Corporation Limited, supra*; namely, how does section 117(b) apply, if at all, to the issue of which employees should be included on the list of employees in this, or any, construction industry bargaining unit?

12. In *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. Apr. 364 (application for reconsideration dismissed [1988] OLRB Rep. July 645), which was also an application for certification made by the applicant herein pursuant to section 144(1) of the Act, the Board rejected a suggestion that it should depart from the *Gilvesy* test. In that case also, the Board concluded that mechanics (that is, persons primarily engaged in repairing or maintaining cranes, shovels, bulldozers or similar equipment) employed by that respondent who regularly performed repair or maintenance work both on construction-sites and in a "shop" were commonly associated in their work with on-site employees within the meaning of section 117(b) of the Act. One of the respondent's mechanics in that case spent the entire date of application working off-site in a shop apparently within the geographic area to which that application related. The Board found that employee to be commonly associated in his work or bargaining with on-site employees in the bargaining unit (within the meaning of section 117(b) of the Act) and that he should be included in the bargaining unit for purposes of the application for certification. In doing so, the Board followed the decision in *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197 and disapproved of the decisions in *J & M Chartrand Realty Limited*, [1978] OLRB Rep. May 423 and *590308 Ontario Inc.*, Board File No. 0915-87-R, November 26, 1987, unreported, which latter decisions make no reference to section 117(b). With great respect, we prefer and agree with the approach in *Bill Brownlee Excavating Limited, supra*, and *Esam Construction, supra*.

13. Section 117(b) provides that:

- (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;

14. As intimated in paragraphs 4 and 5 above, section 119, the designation orders made under section 139, and section 144(1) operate together to prescribe the appropriate unit of employees for collective bargaining in the ICI sector of the construction industry. Other than requiring that the bargaining unit in an application like this one include all employees who would be bound by a provincial agreement, these provisions do not, however, prescribe which individuals must be included in the bargaining units. The opening words of section 117 limit its application to sections 118 through 136 of the Act. On its face, section 117 appears to apply to section 119 but not to section 144, other than as incorporated by reference into the latter (for example, section 117(e) is referred to in section 144(1)). However, section 119(1) provides that:

119.-(1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project.

(And section 118 provides that section 119(1) prevails over section 6(1) in the event of a conflict between them.) Consequently, although all applications for certification in the construction indus-

try are made pursuant to section 144 section 119 is the root of all such applications. Accordingly, section 117 does, in effect, apply to section 144. Indeed, it would make little sense to find otherwise because if it did not apply to section 144, it would apply to nothing at all (see paragraph 4, above).

15. While it is possible for an employee to be employed in different bargaining units at different times, s/he can only be in one bargaining unit at any one point in time. As the *Gilvesy* test and that line of cases demonstrates, the Board has concluded that, for construction industry certification purposes, the date of application (which is “the time the application was made” for the purpose of section 7(1)) constitutes a single point in time. Consequently, an employee can only be in one bargaining unit for certification purposes. (As *Harnden & King Construction Ltd.*, [1987] OLRB Rep. Dec. 1510 (at paragraph 14) demonstrates, the Board has also arrived at this conclusion without reference to the *Gilvesy* test or that line of cases.) Pursuant to the *Gilvesy* test, the bargaining unit an employee is in, if any, is the one in which s/he spent a majority of his/her time in on the date of application. The Board is aware that this can result in some apparent anomalies. However, it is also the Board’s experience that such anomalies do not arise very often. Further, any test employed by the Board in certification matters will be somewhat arbitrary and create some anomalies, particularly at its edges. The application of the “majority of time on the date of application” test to determine which individuals are employees in the bargaining unit in a construction industry application for certification reflects the Board’s attempt to use as certain, equitable and expeditious a means as possible to ascertain who is in such a bargaining unit.

16. There remains to be determined, however, what is meant by the “majority” of time on the date of application. Should it mean that an individual must have spent more than 50% of his/her working time on the date of application in a bargaining unit in order to be included in it for certification purposes? Or should it mean that an individual will be considered to be in whichever bargaining unit s/he spends the most time in? If the first approach was adopted, an employee who worked at more than two kinds of work (or in more than two geographic areas) could work a full day but, having spent less than a majority of his/her working time at any one kind of work (or in any one geographic area), end up being in no bargaining unit for certification purposes. The undesirable result can be avoided if the second approach is adopted. Accordingly, and even though as with any test there may be other anomalies, we favour that second approach.

17. In our view, there is no conflict between the *Gilvesy* date of application test and section 117(b) of the Act. Prior to the enactment of what is now section 117(b) in 1970, the Board excluded shop, yard and other off-site employees from construction industry bargaining units. Subsequent to the enactment of that provision, the Board has had to determine, as a question of fact, whether employees engaged in off-site work are commonly associated (in their work or bargaining) with the on-site employees in question. The wording of section 117(b) is such that, once the Board finds that an employee is so commonly associated, such an employee must be considered to be a construction employee. The Board has no discretion to find that s/he is not.

18. However, the fact that an off-site employee must be considered to be a construction employee does not dictate that s/he must be included in any particular bargaining unit. Section 117(b) is directed at the question of which employees are employed in the construction industry. It does not relate to a community of interest issue, other than in the broad sense of distinguishing between construction and non-construction employees and perhaps indicating which employees may be candidates for inclusion in a particular bargaining unit. For craft bargaining units, community of interest is determined primarily (but not exclusively) on the basis of the skills and working conditions which distinguish the employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development of that

industry along trade or craft lines and the Board's recognition thereof in its approach to it. Section 117(b) does not operate to determine which persons were employees in the bargaining unit for purposes of the count in an application for certification (see paragraph 14, above). The *Gilvesy* test is applied by the Board to determine that question (see *Bill Brownlee Excavating Limited, supra*). For example, an off-site employee in the trade could be commonly associated in his/her work or bargaining with on-site employees within the meaning of section 117(b), but not be at work on the date of application. Such an employee although otherwise encompassed by the bargaining unit description, would not be counted as an employee in a bargaining unit for certification purposes. Further, an off-site employee in the trade who satisfied the section 117(b) test and was employed in the geographic area to which the application related would be included in the bargaining unit. However, an off-site employee in the trade who satisfied the section 117(b) test but was employed outside the geographic area to which the application related (an, in section 144(1) applications, in other than the ICI sector) would not be included.

19. Construction equipment like bulldozers, scrapers, and so on, is often kept, repaired and maintained at the job site where it is being used. However, many employers which use such equipment in their construction business also have a yard or shop where such equipment is stored when not in use, and where repair and maintenance work is also carried out on them. Whether or not off-site employees primarily engaged in the repair or maintenance of such equipment are commonly associated in their work with on-site operators and mechanics, such off-site mechanics have traditionally, both prior to and since the advent of province-wide bargaining in 1978, been treated differently from on-site mechanics (and operators) by both employees and the applicant trade union. This is because, as a general matter, off-site mechanics tend to perform a different kind of repair or maintenance work than on-site mechanics, command a lower rate of wages than on-site mechanics, have different responsibilities and working conditions than on-site mechanics, and tend to be physically separated from on-site mechanics. There is also a commonly held view that the introduction of province-wide bargaining in the ICI sector of the construction industry was not intended to create additional bargaining rights for trade unions affected thereby or to require such trade unions to represent employees which they had not previously represented.

20. The Board is aware of all of that. We also accept that, to the extent it is able, the Board's practices and policies should reflect and be responsive to the real world of labour relations. This does not mean that the Board can or should blindly follow the lead of the labour relations community. The Board is an administrative tribunal established by the *Labour Relations Act* to administer and apply that legislation. While the Board enjoys a considerable discretion in that respect, it must not exceed its jurisdiction. The Board has no statutory or inherent jurisdiction to "do what it thinks is best" or otherwise do, or require to be done, anything which is contrary to the Act. In this case, the designation order and the description of the bargaining unit which the Board has found to be appropriate do not differentiate between on-site and off-site mechanics. In the result, and having regard to the above analysis, we find ourselves constrained to conclude that notwithstanding the distinction which appears to have been made between them within the labour relations community, both on-site and off-site mechanics who were at work on the date of application must be included on the list of employees, both in this case and generally in an operating engineers' bargaining unit which is the subject of an application for certification made pursuant to section 144(1) of the Act. Accordingly, the persons who are to be included in the bargaining unit herein are:

All employees of the respondent employer at work on the date of application who spent a majority of their time on that date engaged in either the operation of cranes, shovels, bulldozers or similar equipment or primarily engaged, whether on-site or off-site, in the repairing or maintaining of the

same (or, pursuant to *Kraft Construction Company (1978) Ltd., supra*, engaged as surveyors). Further, and also in accordance with the *Gilvesy* test, where the evidence with respect to the work that an employee performed on the date of application is either inconclusive or not determinative, any other relevant factor will be considered by the Board. (In circumstances where the sector of the construction industry in which an off-site mechanic was working must be ascertained (as, for example, in an application pursuant to section 144(1) where the employee in question worked at a location outside of the "geographic area" to which the application relates), it will be necessary to determine the sector in connection with which s/he worked.)

21. Any difficulties that this decision may pose to those involved in employing or representing operating engineers can, in our view, be dealt with in collective bargaining.

22. In its February 26, 1988 decision, the Board also noted the challenges being made by the applicant to the list of employees filed by the respondent, and, with respect thereto, authorized a Labour Relations Officer to inquire into and report to the Board with respect to:

- i) the duties of those employees on the application date including the location where the employees worked on that date;
- ii) the duties and responsibilities of Bruce Whitlow to enable the Board to determine whether he exercised managerial functions;
- iii) the community of interest among the persons classified as mechanics with the other employees of the respondent employed in the respondent's shop.

[sic]

23. The Labour Relations Officer designated to conduct the inquiry completed a report with respect thereto. The Board received written submissions from the parties and also convened a hearing at which the parties made oral submissions with respect to that report.

24. Prior to the hearing, the parties agreed that Jerry Marsh should not be on the list of employees. We also note that although there is a dispute with respect to whether or not Ken Copeland and Jeff Shular should be on the list of employees, that issue is part of a complaint under section 89 of the *Labour Relations Act* (Board File No. 2538-87-U) and was not a matter with which the Officer's inquiry was concerned. Consequently, the issue of their status as employees in the bargaining unit was not before the Board in this phase of the proceeding.

25. The respondent is a road construction contractor. Its offices are located in Paris, Ontario (which is in Board Area 4). It also maintains a yard and a two-way repair shop there. The repair shop is used for the purpose of making those repairs to the respondent's construction machinery which cannot be completed on the job site. The respondent was not doing any work in the industrial, commercial and institutional ("ICI") sector of the construction industry on the date this application was made. However, it did have several non-ICI sector job sites. Two of these (Pine Bush Road and Franklin Boulevard) were in the geographic area to which this application relates (i.e. Board Area 6), one was in Guelph (which is in Board Area 7), and one was in Tavistock (which is in Board Area 3). We note that, unlike what seems to have been the situation in *Bill Brownlee Excavating Limited, supra*, the respondent's shop is outside the geographic area to which this application relates.

26. There are six individuals whose inclusion on the list of employees is in issue and who

were the subject of the Officer's inquiry. Having regard to the Officer's report and the representations of the parties with respect to the individuals whose inclusion on the list of employees is in dispute, the Board finds that:

- (a) *James (Jim) R. Devereux* is classified, and employed by the respondent, as a "float driver - maintenance". Although he operates construction equipment on occasion, he is, and is considered by the respondent to be, primarily a truck driver. The evidence is clear that on the date of application Mr. Devereux spent the majority of his time working as a float driver. In our view, the time he spent preparing a piece of machinery for loading onto the float truck, or driving a machine on or off the float truck forms a part of the normal duties and responsibilities as a float truck driver. Further, driving a machine on or off a float truck, or driving it over a road from one location to another, however difficult that might be, is not equivalent to operating a machine on a construction job site.
- (b) *Bruce Whitlow* is classified as and, on the date of application, worked as a working foreman. As such, he oversees and directs other employees in a general way. However, he has no power to hire, fire, or discipline employees, or to make effective recommendations in that respect. He may provide information to Don Gurney (the President and principal of the respondent) which the latter might use in making decisions with respect to such matters but Mr. Whitlow has no real input into the decision-making process. Nor does Mr. Whitlow have any independent decision-making authority with respect to the operation of the respondent or its construction projects. Any involvement in that respect is as a mere conduit for communications between Mr. Gurney and the respondent's employees on one hand, and, for example, the project owner on the other. Mr. Whitlow has no control or even input into the rates of pay or hours of work of other employees. He has no authority to grant employees any time off. He is not involved in budgetary matters and can, at most, make only minor purchases for which he is reimbursed by the company. As part of his normal duties on the date of application he assisted in the starting and routine maintenance of machinery, assisted in on-site repairs of a bulldozer, and operated a packer for approximately two hours. It is evident that Mr. Gurney, or, if he is unavailable, Margaret Gurney, has direct control over the respondent's operations and employees.
- (c) *Art Gariepy* is classified by the respondent as a mechanic. Except when the respondent's construction activities stop for the winter, he works primarily on construction job sites. On the date of application he worked for approximately ten hours on the two job sites which are within the geographic area to which this application relates. We accept his estimate that he spent between three and three and a half hours of that time helping Mr. Devereux load and unload the float truck. The balance of his time; that is, the majority of his working day, was spent doing maintenance and repair work on various pieces of machinery including a bulldozer and a Volvo (a gravel truck-like

off-road construction vehicle). This is representative of his usual duties and responsibilities which consist of maintaining and repairing construction machinery operated by employees in the bargaining unit. We note that while Mr. Gariepy may on occasion operate such machinery as well, occasional interchanges between operators and mechanics employed by the respondent are not uncommon.

- (d) *John Hockley* is employed by the respondent as an on-site mechanic. He generally spends all of his working hours on a construction job site performing checks on and helping start machinery, as well as fuelling and doing on-site repairs on such machinery as required. That is in fact what he did on the date of application. He also helps load or unload the float truck when necessary and occasionally operates some of the machinery. He may also accompany a piece of machinery which has broken down on the job site to the respondent's repair shop where he either does or assists in the necessary repair work.
- (e) *Bill Roddam* is the respondent's chief mechanic. He works both in the repair shop and on job sites, as required, repairing the respondent's construction machinery. Overall, he spends approximately 80 per cent of his time in the shop. On the date of application, he spent approximately three and a half hours at the Guelph job site (that is, outside of the geographic area to which this application relates) followed by an hour at the Pine Bush Road site, where he checked scrapers and Mr. Gariepy's bulldozer repairs. He then went to the Franklin Boulevard job site for about twenty minutes and then returned to the shop where he worked from approximately 1 p.m. to 5 p.m.
- (f) *George William Edward (Bill) Sibbick* is employed by the respondent as a maintenance repair welder of its construction machinery. Although the respondent considers him to be a shop (i.e. off-site) employee, he works both in the repair shop and on job sites. On the date of application, he spent his first working hour in the shop, and travelled to Guelph where he worked on machines until noon or 12:30 p.m. He then went to the Pine Bush Road site for about fifteen minutes and the Franklin Boulevard site where he spent approximately forty-five minutes. After that, he returned to the shop for the rest of the day.

27. Employees engaged in driving float trucks which are used to transport construction machinery to or from construction-sites are truck drivers employed in the construction industry (see *Bill Brownlee Excavating Limited*, *supra*; *Canadian Road Asphalts Limited*, [1980] OLRB Rep. March 299; *Cooper's Crane Rental Limited*, [1980] OLRB Rep. Sept. 1286; *Cedarhurst Paving Company Limited*, [1964] OLRB Rep. Dec. 442). However, the bargaining unit which the Board found, in paragraph 9 of its February 26, 1988 decision, to be appropriate for collective bargaining in this case does not include such truck drivers (see *Bill Brownlee Excavating Limited*, *supra*; *Bruno's Contracting (Thunder Bay) Limited*, [1985] OLRB Rep. Dec. 1701; *Armbro Materials and Construction Limited*, [1973] OLRB Rep. Aug. 450; *Cedarhurst Paving Company*

Limited, supra). James R. Devereux, who spent the majority of his time on the date of application working as a float truck driver, should therefore not be included on the list of employees.

28. Section 1(3)(b) of the *Labour Relations Act* provides that, subject to section 90 (which does not apply here), no person shall be deemed to an employee who, in the opinion of the Board, exercises managerial functions. Consequently, in applications for certification, the Board excludes all persons employed at and above the lowest level of management from the bargaining unit. Working foremen are usually included in construction industry bargaining units unless they have a real overall responsibility for a construction-site or project, or can and do affect the employment status of employees in the bargaining unit. On the evidence before the Board, Bruce Whitlow should be included on the list of employees. He does not exercise managerial functions within the meaning of section 1(3)(b) of the Act. Indeed, if his duties and responsibilities were held to constitute such managerial functions, most working foremen would probably be excluded from construction industry bargaining units.

29. On the date of application, Art Gariepy spent the majority of his time on-site primarily engaged in the maintenance and repair or construction machinery operated by other employees in the bargaining unit: that is, he spent the majority of his time on-site doing operating engineers work in a geographic area to which this application relates. He should therefore be included on the list of employees.

30. John Hockley clearly spent the majority of his time on the date of application on a construction job site primarily engaged in maintaining or repairing construction machinery operated by other employees in the bargaining unit. He should therefore also be included on the list of employees.

31. Bill Roddam and Bill Sibbick are primarily off-site mechanics. They are commonly associated in their work with on-site employees in the bargaining unit, but they did not on the date of application, spend a majority of their time performing bargaining unit work in either the ICI sector or in any other sector of the construction industry in the geographic area referred to in the bargaining unit description. They should therefore not be included on the list of employees.

32. As a result of the agreement of the parties and the Board's findings herein, the following employees names presently appear on the list of employees in the bargaining unit:

Art Gariepy
Garnet Green
Dave Guthrie Jr.
John Hockley
Judy Kendall
Lewis Peters
Len Smith
Norm Stenson
Al Whitlow
Bruce Whitlow.

In addition, the applicant asserts that Ken Copeland and Jeff Shular should also be included on the list.

33. It appears that the Board cannot dispose of this matter on the basis of the material presently before it. Accordingly, the Registrar is directed to schedule this matter for hearing for the

purpose of hearing the evidence and representations of the parties with respect to all remaining matters out of and incidental to the application.

34. Given the relationship between this application and the complaint in Board File No. 2538-87-U, the two matters should be scheduled to be heard together.

COURT PROCEEDINGS

1931-87-U (Court File No. 674/88) The United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Labourers' International Union of North America, Local 183, **Bay-Tower Homes Company Ltd.**, Bay-Tower Management Inc., Ledi Properties Inc., 518270 Ontario Limited, 554614 Ontario Limited, and the Ontario Labour Relations Board, Respondents

Construction Industry - Evidence - Judicial Review - Picketing - Unfair Labour Practice - Picketing by Labourers Union found to be in breach of the Act - Purpose of picketing was to induce employers to grant bargaining rights to Labourers Union - Board granting declaratory relief to complainant Carpenters Union but not nullifying collective agreements - Carpenters Union bringing application for judicial review on the grounds that, *inter alia*, the Board refused to permit the applicant to lead evidence going to remedy - Judicial review dismissed by Divisional Court

Board decisions found at [1988] OLRB Rep. March 259 and [1988] OLRB Rep. June 560.

High Court of Justice, Divisional Court, Montgomery, Van Camp and White JJ., May 31, 1989:

Montgomery J. (endorsement): This application for judicial review of a decision of the Ontario Labour Relations Board (the "Board") arose from three interrelated Board hearings that dealt with a complaint by The United Brotherhood of Carpenters and Joiners of America, Local 27 ("Carpenters Union"). The complaint alleged breach of sections 70 and 74 of the *Ontario Labour Relations Act*. The essence of the complaint was that Labourers' International Union of North America, Local 183 ("Labourers' Union") engaged in an illegal recognition strike, to pressure respondent employers into signing collective agreements. Carpenters Union allege that the result gained by this illegal activity affected and interfered with the work members of Local 27 perform pursuant to a collective agreement with a subcontractor, M. M. Amarcord Carpenters Ltd.

The Carpenters Union's position is that there was a denial of natural justice because the Board refused to allow Carpenters Union to lead evidence relating to sanctions after finding that the strike was unlawful.

The applicant sought to lead evidence of other collective agreements signed by other parties after the events complained about in this proceeding. The Board ruled this evidence inadmissible as irrelevant to the issue. Even if the Board had been in error on this ruling, it could not amount to jurisdictional error. (*Marques and Dylex Ltd. et al.* (1977), 81 D.L.R. (3d) 554 (Ont. Div. Ct.)). The excluded evidence was tendered to demonstrate the illegality of the strike.

We are of the opinion that the Board did not deny the applicant the opportunity to lead evidence or make argument as to remedy. The Board, therefore, committed no jurisdictional error or denial of natural justice.

The application is dismissed. Costs to the Labourers' Union. No costs are sought by the Board.

3434-87-R (Court File No. 1108/88) The Labourers' International Union of North America, Ontario Provincial District Council, and its Affiliated Local Unions Labourers' International Union of North America, Locals 183 et al., Applicants v. Ontario Labour Relations Board, 657572 Ontario Inc., c.o.b. as **Double S Construction**, Michael Van Landeghem, Tracy Van Landeghem and Terry Manzutti, Respondents

Construction Industry - Judicial Review - Parties - Practice and Procedure - Reconsideration - Termination - Termination application naming as respondents District Council and one local - International, District Council and all affiliated union locals necessary parties - Application dismissed at hearing - Board reconsidering its decision to dismiss and permitting applicants to amend the title of the application - Labourers Union bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law by failing to notify the Union that it intended to reconsider its decision and by failing to afford the Union an opportunity to make submissions - Judicial review dismissed by Divisional Court

Board decision found at [1988] OLRB Rep. Aug. 800.

High Court of Justice, Divisional Court, Callaghan, Osler and Montgomery JJ., May 16, 1989:

Callaghan J. (endorsement): In our view the Board acted within its jurisdiction in reconsidering its oral decision of July 11/88 pursuant to s.106(1) of the Act. If there had been evidence before this Court of any change of position of any of the parties as a result of their reliance on that oral decision our order might have been different. In the circumstances however we see no useful purpose in granting the order sought and accordingly the application is dismissed without costs.

1398-83-R; 1399-83-R; 1503-83-M; 0916-84-U (Court File Nos. 746/86, 179/88) 556631 Ontario Limited, carrying on business as **G.P. Construction**, Applicant v. The International Brotherhood of Electrical Workers, Local 1687, and The Ontario Labour Relations Board, Respondents

Judicial Review - Related Employer - Unfair Labour Practice - Construction companies declared to be one employer - Adjournment of hearing to determine quantum of damages on the ground of insufficient notice to one corporation denied - Corporation bringing application for judicial review on the grounds that, *inter alia*, the Board erred in finding that related business activities were carried on and in denying the adjournment - Judicial review dismissed by Divisional Court

Board decision found at [1986] OLRB Rep. May 617 (December 15, 1987 decision unreported).

High Court of Justice, Divisional Court, Southey, Boland and Arbour JJ., June 27, 1989:

Southey J. (endorsement): The Board considered at some length this question of notice to the applicants in paragraphs 4 to 7 of its decision of December 15, 1987, and found that both had received adequate notice of the hearing that commenced on November 2/87. It is clear that the Board was not relying on the notice received by Mr. Pope in California on October 31, 1987, but on the notices sent in August to Timmins. There is nothing in the Record to establish that there

was insufficient evidence before the Board at the November hearing to support that finding. The affidavit of Mr. Pope does not adequately deal with the matter. He was not present at the hearing.

We think it can scarcely be questioned that the Board's findings in its decision of May 20, 1986, are sufficient to support its conclusion that the activities of FDV Construction Limited, and the 2 numbered companies operating under the names Bluebird Construction and G.P. Construction were carried on under this common control or direction of William Moffatt. It is not necessary to this conclusion that all the criteria stated by the Board in its earlier decisions like *Walters Lithographing*, be met in order to satisfy the provisions of s.1(4) of the Act.

The application is dismissed with costs. The Board does not ask for costs.

0542-86-R; 0035-86-U (Court File Nos. 272/88, 284/88) Donna Baydak on behalf of a group of 156 employees, Applicants v. The Ontario Labour Relations Board and The United Food and Commercial Workers' Union, Local 206 and **Knob Hill Farms Limited**, Respondents; Knob Hill Farms Limited, Applicant v. The Ontario Labour Relations Board and The United Food and Commercial Workers' Union, Local 206 and Donna Baydak on behalf of a group of 156 employees, Respondents

Certification Where Act Contravened - Charter of Rights and Freedoms - Judicial Review - Unfair Labour Practice - Board determining that lay off of workers constituting unfair labour practice - Union certified pursuant to s.8 - Reverse onus not contrary to Charter - Employer and employees bringing applications for judicial review on the grounds that, *inter alia*, the Board misled the employees as to the evidence to be adduced and failed to find the reverse onus provision to be contrary to the Charter - Judicial reviews dismissed by Divisional Court

Board decision found at [1987] OLRB Rep. Dec. 1531.

High Court of Justice, Divisional Court, Rosenberg, Montgomery, and Hollingworth JJ., June 9, 1989:

Rosenberg J. (endorsement): There is evidence on which the Board could make the findings of fact that they did.

The Board's decision to attach no weight to the petition was one that is not reviewable by this court.

The remarks of the chairman and vice chairman even if as alleged by the applicants were not improper. If those remarks were misunderstood by the applicant such misunderstanding does not create a miscarriage of natural justice that justifies our interference with the Board's decision. The applications are dismissed. One set of costs by Knob Hill to union.

[Donna Baydak is seeking leave to appeal to the Court of Appeal the Divisional Court's decision: Editor]

1949-86-OH (Court File No. A29/89) Douglas Lloyd, Applicant v. The Crown in Right of Ontario (Ministry of Community and Social Services) and Ontario Labour Relations Board, Respondents

Charter of Rights and Freedoms - Health and Safety - Judicial Review - Youth services officer at secured custody facility refusing to work at another location at the facility because of his belief that he would be putting his co-workers in danger - Officer completing shift at his regular location and receiving reprimand letters - OHSA providing that such persons do not have the right to refuse work which would endanger co-workers' safety - Board dismissing complaint - Worker cannot refuse work on the basis that some other provision in the Act creates a right to disobey the employer - Officer's actions constituting insubordination - Board not exercising discretion to substitute a different penalty - Officer bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law and exceeded its jurisdiction in its interpretation of the OHSA and that the provision in the OHSA by which he was excluded from the right to refuse unsafe work was contrary to s.15, the equality provision, of the Canadian Charter of Rights and Freedoms - Judicial review dismissed by Divisional Court - Application by officer for leave to appeal to the Court of Appeal dismissed

Board decision found at [1988] OLRB Rep. Jan. 50. Divisional Court decision found at [1989] OLRB Rep. March 316.

Court of Appeal, Blair, Krever, and Catzman JJ.A., June 5, 1989:

Blair J.A. (endorsement): The motion for leave to appeal is dismissed with costs payable to the respondent, The Crown in Right of Ontario but there will be no costs for the Ontario Labour Relations Board.

2241-86-R (Court File No. 696/88) Ontario Hydro, Applicant v. Ontario Labour Relations Board; The Society of Ontario Hydro Professional and Administrative Employees; Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union, Local 1000; The Coalition to Stop Certification of the Society on behalf of certain employees; Tom Stevens; C.S. Stevenson; Michelle Morrissey-O'Ryan; George Orr, Respondents

Certification - Constitutional Law - Judicial Review - Board determining that there is a category of employees of Ontario Hydro who are employed on or in connection with works which by section 17 of the *Atomic Energy Control Act* have been declared to be works for the general advantage of Canada - Ontario Hydro bringing application for judicial review for a declaration that the *Labour Relations Act* applies to its nuclear workers - Divisional Court quashing Board decision and declaring that the provincial Act applies to the nuclear employees of Ontario Hydro

Board decision found at [1988] OLRB Rep. Feb. 187.

High Court of Justice, Divisional Court, Steele, Montgomery and White JJ., June 12, 1989:

Steele J: The applicant, Ontario Hydro (Hydro), applies to this court by way of judicial review for

an order quashing the decision of the Ontario Labour Relations Board (Board) that in effect declared that the Ontario *Labour Relations Act*, R.S.O. 1980, c.228 (the Ontario Act), had no application to the employees of Hydro that are involved in nuclear power generation. It also applies for a declaration that the Ontario Act applies to such employees and that the *Canada Labour Code*, R.S.C. 1985, c.L-2 (the Code), does not apply, and for an order directing the Board to deal with the certification application by the respondent, the Society of Ontario Hydro Professional and Administrative Employees (the Society). The application is supported by the Society as well as the Canadian Union of Public Employees--C.L.C. Ontario Hydro Employees Union Local 1000 (C.U.P.E.), and by the intervenor, the Attorney General for Ontario. The application is opposed by the intervenor, the Attorney General of Canada and The Coalition to Stop Certification of the Society on Behalf of Certain Employees, Tom Stevens, C.A. Stevenson, and Michelle Morrissey-O'Ryan (the Coalition). Counsel for the Board appeared to support its decision.

The Society applied to the Board for certification as the exclusive bargaining agent for a unit of administrative, scientific and professional engineering employees of Hydro. Some of these employees were employed at Hydro's nuclear electrical generating stations, while others were employed in other types of electrical generating stations. The Board decided that, prior to determining whether or not such certification should take place, it should decide whether there was a category of employee of Hydro definable by reference to the words of s.18 of the *Atomic Energy Control Act* (the *AEC Act*) over whom the Board would have no jurisdiction to include in a bargaining unit. By its decision of February 25, 1988, the Board held that the Ontario Act was inapplicable to nuclear workers because nuclear generating stations were federal undertakings pursuant to the *Constitution Act, 1867* and s.18 of the *AEC Act*. It based its decision primarily on the grounds that s.18 declared the works to be for the general advantage of Canada.

No objection is taken to the timeliness of this application. No issue is taken that Hydro is not subject to the *AEC Act* or its Regulations. Hydro uses and produces substances prescribed under the *AEC Act*. The issue is whether s.18 is invalid insofar as it purports to be a declaration placing all of Hydro's nuclear plants entirely subject to federal control, including labour relations. Counsel for both the Attorney General of Canada and the Attorney General for Ontario advised the court that they had received adequate notice of the constitutional question of the validity of s.18 of the *AEC Act* to the extent necessary to determine the application before the court.

Hydro is a provincial statutory corporation established to generate, transmit, supply, sell and use electrical power in Ontario. It is not a Crown agency (see *Crown Agency Act*, R.S.O. 1980, c.106). It has 81 electrical generating stations, of which five are nuclear. These nuclear stations provide 48% of its total electrical energy production. Regardless of whether electrical power is generated from a nuclear, thermal or hydraulic station, or is purchased from other utilities, it is distributed on a common grid throughout Ontario.

At the present time C.U.P.E. is certified as the province-wide bargaining agent for all unionized employees of Hydro. Such certification covers employees in almost every field of labour and all are subject to the Ontario Act. If nuclear workers are to be subject to the Code they would be an exception to the general employees of Hydro. There would be two labour codes governing the same class of employees. Since at least 1973 the Board has certified C.U.P.E. as the bargaining agent for employees at the Bruce nuclear plant of Hydro. However, it appears that the constitutional question now raised has never before been an issue.

The *AEC Act* was first enacted in 1946, long before any nuclear electrical generating stations were in operation anywhere in Canada. Hydro has received licences and operated under the *AEC Act* since its first nuclear station came into being in 1962.

The basic issues are as follows:

- (1) Whether the *AEC Act* requires that labour relations between Hydro and its organized employees be governed by the Code; or, alternatively,
- (2) Whether Hydro, in the absence of federal legislation specifically including it under the Code, is governed in its labour relations with its employees by the Ontario Act.

The relevant legislation is as follows:

AEC Act

Whereas it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy, and to enable Canada to participate effectively in measures of inter-nation control of atomic energy which may hereafter be agreed upon;...

• • •

18. all works and undertakings whether hereinbefore or hereafter to be constructed,

- (a) for the production, use and application of atomic energy;
- (b) for research or investigation with respect to atomic energy; and
- (c) for the production, refining or treatment of prescribed substances,

are and each of them is declared to be works or a work for the general advantage of Canada.

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

• • •

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

• • •

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

• • •

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

• • •

10. Local Works and Undertakings other than such as are of the following Classes:--
 - a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and Other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
 - b. Lines of Steam Ships between the Province and any British or Foreign Country;
 - c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

• • •

16. Generally all Matters of a merely local or private Nature in the Province.

• • •

Constitution Act, 1867 to 1982

92A (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

• • •

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

No one attacked the basic constitutional validity of the *AEC Act* under the peace, order and good government power of s.91 of the *Constitution Act*, but some parties argued that it must be read in conjunction with ss.91 and 92 and 92A under a doctrine of mutual modification.

Counsel for the Attorney General of Canada submitted that the power given to Parliament under s.92-10c when read with the opening and closing words of s.91, and with para.29 thereof, gives Par-

liament the power to declare any class of subjects granted to a province under s.92 or any other section such as s.92A or s.93 to be federal, and thereby exclude all provincial jurisdiction there-over.

We were advised that the argument of the limitation of the power granted in clause c. was of first instance in this court. There are numerous instances where the validity of such declaratory power has been upheld relating to specifically designated works. One example is *The Queen v. Thumler*, 20 D.L.R. (2d) 335, where grain elevators in Alberta were listed in a schedule to an Act of Parliament and all dealings therein were thereafter deemed to be subject to federal laws. Also, in *Regina v. Red Line Ltd.* (1930), 66 O.L.R. 53, works that were purchased by the federal government for a specific federal purpose were deemed subject to federal laws, although the case did not hold that provincial laws were excluded. None of these cases apply to the present.

Before the enactment of s.92A it could have been argued that works for the production of electrical energy were local works. If so, they could have been declared to be for the general benefit of Canada under s.92-10c. However, by making special provision for such facilities in s.92A, they are removed from the category of works contemplated by s.92-10.

On its plain meaning, clause c of s.92-10 refers only to "Such Works." "Such Works" can only refer to local works and undertakings contemplated to be within para.10. It cannot refer to the power specifically granted to a province in s.92A. Where specific overriding power is granted to the federal government in special instances, such power is expressly set out. One such example is in s.92A (3), and another is in s.93 where there is a right of appeal to the Governor in Council. The doctrine of paramouncy also provides the federal government with overriding power.

Section 92A (2) and (3) states that with respect to the export of electrical power, a province has jurisdiction subject to the paramouncy of Parliament. There is no such express limitation on the power conferred in s.92A (1)(c). Section 92A (1)(c) was enacted after the *AEC Act* and Parliament must be deemed to have known that it was placing the generation and production of electrical energy clearly in the jurisdiction of the provinces. For these reasons, s.18 of the *AEC Act* is inapplicable insofar as it purports to declare Hydro's works to be totally for the general advantage of Canada.

It may be that s.92-10c is not applicable to any of the specifically enunciated powers in s.92 such as paras. 6 and 7, but it is not necessary for us to so decide.

Notwithstanding the above conclusion, Parliament had the jurisdiction to enact the *AEC Act* in the national interest under the opening words of s.91 within its powers relating to the peace, order and good government of Canada. This being so, the pith and substance of the *AEC Act* must be considered. Was it intended to cover all aspects of nuclear power development or merely those declared to be in the national interest? The preamble refers only to "the control and supervision of the development, application and use of atomic energy." No reference is made to the actual development facilities for it. The *AEC Act* establishes a board that may make regulations for the following purposes:

9. The Board may, with the approval of the Governor in Council, make regulations
 - (a) for encouraging and facilitating research and investigations with respect to atomic energy;
 - (b) for developing, controlling, supervising and licensing the production, application and use of atomic energy;
 - (c) respecting mining and prospecting for prescribed substances;

- (d) regulating the production, import, export, transportation, refining, possession, ownership, use or sale of prescribed substances and any other things that in the opinion of the Board may be used for the production, use or application of atomic energy;

The Minister is given certain powers and reference is made to a company owned by Her Majesty the Queen in the Right of Canada. No direct reference is made to any specific work and it is only s.18 that is in issue.

The Regulations under the *AEC Act* provide for the licensing of persons producing or using nuclear substances. Hydro is such a producer and user, and has been licensed since it first operated nuclear facilities. At present, licences relate only to matters in the interest of health, safety and security. These include the qualifications, training and experience of persons using or supervising the use of nuclear products, or the operation of nuclear facilities. Nothing therein generally governs the management or labour relations of a facility. Only detailed aspects of operation are governed.

The constitutional principles relating to labour relations were set out by Dickson J. in *Northern Telecom Limited v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 at 132 and 133 as follows:

- (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
- (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
- (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
- (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
- (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
- (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern" without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, *Arrow Transfer Co. Ltd.* [[1974] 1 Can. L.R.B.R. 29], provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

In *Northern Telecom* the issue involved possible services to be provided by some of its employees to Bell Canada. It was assumed that Bell Canada was a federal undertaking under s.92 (10)(a). In *Bell Canada v. Quebec (C.S.S.T.)*, [1988] 1 S.C.R. 749, it was conceded that the works of Bell Canada were a federal undertaking under s.92-10.a. In the latter case it was held that labour relations form a vital and integral part of the management and operation, and that Bell Canada being a federal undertaking labour relations were exclusively within the power of Parliament. Bell Canada fell within a specific head of Parliament's legislative authority and a province could not encroach thereon.

In *Bell Canada*, at pp. 839 and 840, Beetz J. stated as follows:

The second observation is that this analysis does not address the essential question raised and answered by Martland J.: the critics refrain from defining the content of the exclusive legislative authority of Parliament over federal undertakings. This is necessary because the effect of s.91(29) and the exceptions in s.92(10) is to create exclusive classes of subject, those of federal undertakings, to which a basic, minimum and unassailable content has to be assigned to make up the matters falling within these classes. Martland J. considered that the management of these undertakings and their labour relations are matters which are part of this basic and unassailable minimum, as these matters are essential and vital elements of any undertaking. How is it possible to disagree with this? How can the exclusive power to regulate these undertakings not include at least the exclusive power to make laws relating to their management? Additionally, just as the management of the undertaking and working conditions determined by agreement or by operation of law are parts of the same whole in labour law, how can the exclusive power to legislate as to management of an undertaking not include the equally exclusive power to make laws regarding its labour relations? To deny this, as the critics have done, is to strip the exclusive federal power of its primary content and transform it simply into a power to make ancillary laws connected to a primary power with no real independent content, apart from the power to regulate rates and the availability and quality of services such as telephone services or railway services. The latter undoubtedly fall within the exclusive classes of subject represented by such federal undertakings, but there is nothing in the constitutional provisions, rules or precedents to indicate that the exclusive legislative authority of Parliament must or may be confined to so narrow a field....

In my opinion, the above statement is equally applicable to matters within exclusive provincial jurisdiction, such as Hydro. Section 92A (1)(c) gives the Province exclusive power to manage facilities for electrical energy. It therefore has the power to legislate with respect to labour relations. However, unlike the *Bell Canada* case, the *AEC Act* superimposes aspects of Parliament's concerns that must be obeyed. This does not totally exclude provincial jurisdiction.

In the present case, the core undertaking is the production and development of electricity by Hydro. This is a function exclusive to the Province, including its management. It is not a property or work properly declared as a federal work. Hydro is established by provincial statute, its directors' appointments and remuneration are dealt with by Cabinet. All major decisions, including those relating to nuclear, must be approved by Cabinet. While Hydro is expressly stated not to be a Crown agency, in all aspects it acts and is controlled as if it were. The undertaking is clearly a provincial one to generate and distribute electrical energy throughout Ontario. Such integrated business is a going concern. The only exceptional or casual factor involving the federal government is the *AEC Act* which primarily deals with health, safety and secrecy in the nuclear area of Hydro's undertaking. The core undertaking is clearly provincial.

It would be impossible to say that the powers set out in the *AEC Act* describe a core "undertaking" in the sense referred to in the *Northern Telecom* case. However, even if they could, at the present time the *AEC Act* and Regulations relate only to health, safety and secrecy. It cannot be said that all labour relations are "vital", "essential" or "integral" to such undertaking. In any event, s.92A (1)(c) specifies that "management" of the electrical facilities are given to the Prov-

ince. An inferential transfer of such right to the federal government should not be made in face of this specific grant. An Act should not be interpreted to give power to Parliament over a body such as Hydro that has been established as a provincial public policy instrument unless the federal Act expressly, or by necessary implication, provides for it. In the present case the *AEC Act* clearly provides that all nuclear installations are subject to its Regulations and therefore such apply to Hydro.

Section 4 of the Code makes it applicable to employees employed on or in connection with the operation of any federal work, undertaking or business. By definition in the Code, "federal work, undertaking or business" means one within the legislative authority of Parliament, including a work or undertaking declared to be for the general advantage of Canada. This definition is in the same words as in s.92-10 c., which I have already considered. Hydro not being such a work or undertaking, the Code has no application.

In addition, s.5 of the Code specifically includes employees of federal Crown agencies but is silent with respect to provincial Crown agencies. By inference, Parliament did not intend the Code to apply to provincial Crown agencies such as Quebec Hydro. I see no reason why it should be inferentially interpreted to include Hydro which is a provincial public policy instrument unless both Quebec Hydro and Hydro are federal works. As I have found, Hydro is not such a federal work.

The *AEC Act* meets the test set out in *Regina v. Crown Zellerbach Canada Ltd.* (1988), 84 N.R. 1 at 36, relating to the national concern doctrine under the peace, order and good government power of Parliament. It is a new matter that did not exist at Confederation and is a matter of national concern because of its scale of impact upon the nation.

In my opinion, Parliament's power exercised under the peace, order and good government clause is general in nature and must be read together with the specific power given by s.92A (1)(c) to the Province. It should not be read to exclude the provincial power unless absolutely necessary in particular circumstances. I agree with Professor Hogg in his text, *Constitutional Law in Canada* (2nd ed.) at p. 372:

In my view, therefore, the residuary theory of the p.o.g.g. power is more helpful than the competing general theory. The discussion which follows will proceed on the assumption that matters which come within enumerated federal or provincial heads of power should be located in those enumerated heads, and the office of the p.o.g.g. power is to accommodate the matters which do not come within any of the enumerated federal or provincial heads.

The p.o.g.g. power has been the trunk from which three branches of legislative power have grown: (1) the "gap" branch; (2) the "national concern" branch; and (3) the "emergency" branch. Each will be discussed in turn in the text that follows.

Even in relationship to conflicts between specific heads of power in s.91 and s.92, I agree with Professor Hogg at p. 333 of his text, where he states:

...In all these cases the courts have narrowed the meaning of the broader class in order to exclude the narrower class. This process of "mutual modification" is necessary in order to place each head of power in its context as part of two mutually exclusive lists.

Generally speaking, the peace, order and good government power is a residuary type of power covering matters not specifically allocated to the Province. This general statement is subject to Parliament's power to enact legislation of national concern. Where it does so, it may encroach on specific provincial powers but does not supplant them unless expressly and necessarily stated.

Where a work is validly declared to be of national interest, then the provincial power is displaced.

Where the peace, order and good government power is used it does not necessarily displace the entire provincial power. As stated in *Hodge v. The Queen* (1883), 9 A.C. 117 at 130:

...subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

Here, s.18 of the *AEC Act* is ineffective in declaring electrical services to be works of a federal nature and therefore all provincial power is not displaced. There is no duplication of legislation. The aspects differ and therefore the doctrine of double aspect applies (see *Multiple Access Corporation v. McCutcheon*, [1982] 2 S.C.R. 161). However, to the extent set out in the Act and Regulations, the *AEC Act* is valid, and if there is any conflict in practice it must prevail to the extent of the purpose set out therein. If Parliament justifiably amended the *AEC Act* or Regulations to provide that labour relations in all provincial nuclear works must be governed by the Code in the national interests, then such would supplant the Ontario Act. It has not done so and it is not a necessary implication to the objects of the *AEC Act*, as presently stated, to hold that Hydro's labour relations must be governed by the Code. Hydro is not a Crown agency, but even if it was it would be subject to the *AEC Act* to the extent necessary in the national interests.

In *Pronto Uranium Mines v. Ontario Labour Relations Board et al.*, [1956] O.R. 862, it was stated that it would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of atomic energy did not lie within the Regulations of Parliament. The mines in question in the *Pronto Uranium* case were local works and it may well be that in view of s.92-10 c., s.18 of the *AEC Act* validly applies to them. That being so, the comments with respect to peace, order and good government were unnecessary in the decision. From a practical point of view I disagree with the statement insofar as it relates to Hydro because for over twenty-five years the *AEC Act* and the Regulations thereunder have lived in peaceful co-existence with the general labour relations of Hydro being governed by the Ontario Act. This co-existence has been recognized in the Regulations passed under the *AEC Act* by providing in condition number 15 of the sample licence to be issued thereunder, and condition A.A.8 of the licence actually issued to Hydro for the Bruce station, as follows:

Subject to the conditions of this licence, all laws of general application in the Province of Ontario are applicable to and in respect of the nuclear facility and must be complied with, except to the extent that such laws are in conflict with any applicable federal statute or any order, rule or regulation made thereunder.

Clearly, the Ontario Act is a law of general application in Ontario and can stand together with federal laws set out by regulation relating to health, safety and security. Provincial law can be adopted by Parliament even in its own exclusive fields of authority (see *Re A.G. of Canada and Branch Affiliate of Base Borden Collegiate Institute et al.*, 30 O.R. (2d) 428 at 433).

For these reasons I would grant the following relief asked:

- (a) An order in the nature of *certiorari* quashing the decision and directions of the Board dated February 25, 1988, in respect of an application under the Ontario Act by the Society for certification as exclusive bargaining agent for a unit of administrative, scientific and professional engineering employees of Hydro;
- (b) An order in the nature of *mandamus* ordering the Board to deal with the certification application;
- (c) A declaration that the *Code* does not apply to Hydro's nuclear workers;

(d) A declaration that the Ontario Act applies to the nuclear employees of Hydro who are not otherwise exempt from that Act.

I would award costs to Hydro, C.U.P.E., the Society and A.G. Ontario, to be paid by the Attorney General of Canada.

[The Attorney General of Canada is seeking leave to appeal to the Court of Appeal the Divisional Court's decision: Editor]

2018-88-U (Court File No. A46/89) Sabina Citron, Citron Automotive Division of Plaza Fiberglas Manufacturing Limited, Plaza Electroplating Limited, Citcor Manufacturing Ltd., Applicants v. United Steelworkers of America and The Ontario Labour Relations Board, Respondents

Contempt - Evidence- Stated Case - Witness - Principal of respondent refusing to produce employment forms without covering over personal information - Union stating case to Divisional Court - Refusal without lawful excuse - Conduct of principal constituting contempt notwithstanding subsequent compliance with Board order prior to court hearing - Directions and orders of Board must be complied with - Finding of contempt giving principal a criminal record - Sentence of 30 days in jail - Sentence suspended upon principal being on good behaviour - Application by principal for leave to appeal to the Court of Appeal dismissed

Board decision found at [1989] OLRB Rep. May 479. Divisional Court decision found at [1989] OLRB Rep. May 528.

Court of Appeal, Blair, Krever, and Catzman JJ.A., June 5, 1989:

Blair J.A. (endorsement): The motion for leave to appeal is dismissed with costs to the responding party the United Steelworkers of America and not to the Ontario Labour Relations Board.

2181-86-M; 2191-86-M (Court File No. A11/89) The Board of Education for the City of Windsor, Applicant v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 and Ontario Labour Relations Board, Respondents

Collective Agreement - Construction Industry - Employer - Judicial Review - Board finding Windsor Board of Education to be an employer in the construction industry - Employer relying on "gentleman's agreement" as constituting a bar to the union's contracting out grievance - Board declaring "gentleman's agreement" null and void as it applies to the ICI sector - Union not estopped from enforcing the ICI agreement - Board finding that ICI agreement breached - Windsor Board of Education bringing application for judicial review on the grounds that, *inter alia*, the Board declined jurisdiction when it refused to apply the doctrine of promissory estoppel and the Board erred in

determining that the Windsor Board of Education was acting as an “employer” in these circumstances - Judicial review dismissed by Divisional Court - Application by Windsor Board of Education for leave to appeal to the Court of Appeal dismissed

Board decision found at [1988] OLRB Rep. March 342. Divisional Court decision found at [1989] OLRB Rep. Feb. 231.

Court of Appeal, Brooke, Grange, and Finlayson JJ.A., May 15, 1989:

Brooke J.A. (endorsement): The application for leave to appeal is refused with costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1640-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ro-Von Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (45 employees in unit)

2002-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Briecan Const. Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (230 employees in unit)

2436-87-R: Sheet Metal Workers International Association, Local 30 (Applicant) v. Rainscreen Metal Systems Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (28 employees in unit)

3536-87-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. Royce Dupont Poultry Packers (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman and office staff" (54 employees in unit) (*Having regard to the agreement of the parties*)

0402-88-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. H. Fluker Consultants Inc. c.o.b. as Fluker Electrical-Mechanical Contractors (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and

electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2023-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. C & W Asphalt Paving Company of Wallaceburg Ltd. (Respondent)

Unit: "all construction labourers and employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Having regard to the agreement of the parties*)

2474-88-R: United Steelworkers of America (Applicant) v. D.M. Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of London, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period" (35 employees in unit)

2547-88-R: Ontario Public Service Employees Union (Applicant) v. Participation Projects - Sudbury & District (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote*)

Unit #3: "all office and clerical employees of the respondent at Sudbury, save and except supervisors, persons above the rank of supervisor and administration assistant" (4 employees in unit) (*Having regard to the agreement of the parties*)

2577-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Conservatory Construction Co. Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2626-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Menkes Developments Inc. c.o.b. Menkes Properties (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (62 employees in unit)

2653-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Shiplake Management Company (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and

that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2680-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Bradscot Construction Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2906-88-R: Ontario Nurses Association (Applicant) v. Meaford General Hospital (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Meaford, save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than 24 hours per week” (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

2912-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Oakes Mechanical Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all journeymen refrigeration and air conditioning mechanics and all journeymen refrigeration and air conditioning mechanics’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen refrigeration and air conditioning mechanics and all journeymen refrigeration and air conditioning mechanics’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except no-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2991-88-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Edwardsburgh (Respondent)

Unit: “all employees of the respondent in the Township of Edwardsburgh regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisor, persons above the rank of supervisor, office, clerical and technical staff, and persons for whom any trade union held bargaining rights as of March 2, 1989” (4 employees in unit) (*Having regard to the agreement of the parties*)

3004-88-R: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Applicant) v. Minto Construction Ltd. (Respondent)

Unit: “all employees of the respondent employed at Place Minto Place Suite Hotel in the City of Ottawa, save and except supervisors and persons above the rank of supervisor, executive office staff, front office staff, accounting office staff, personnel office staff, sales office staff, lifestyle centre staff and persons employed by Minto Management Limited” (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3005-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 202 (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at 714 and 716 The West Mall, in the Municipality of Metropolitan Toronto and including resident superintendents, save and except property manager, persons above the rank

of property manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

3017-88-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. 810320 Ontario Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3022-88-R: Ontario Public Service Employees Union (Applicant) v. The Sudbury Board of Education (Respondent)

Unit: "all Educational Assistants in the employ of the respondent in the District of Sudbury, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of March 7, 1989" (39 employees in unit) (*Having regard to the agreement of the parties*)

3219-88-R: Canadian Union of Public Employees (Applicant) v. Cledic Enterprises Ltd. c.o.b. as Parisien Manor Nursing Home (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and the secretary to the administrator" (59 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3225-88-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. L. J. Vandenberg (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0004-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Proving Graphics Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff and employees in bargaining units for which any trade union held bargaining rights as of April 3, 1989" (10 employees in unit) (*Having regard to the agreement of the parties*)

0017-89-R: Service Employees International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Men's Support Services of York Region (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of York, save and except supervisors, persons above the rank of supervisor, and Secretary to the Executive Director" (32 employees in unit) (*Having regard to the agreement of the parties*)

0018-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Jo-Mic Foods Inc. c.o.b. Poultons Valu-Mart (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Sudbury, save and except store managers, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

0019-88-R: Retail, Wholesale & Department Store Union, (Applicant) v. Jo-Mic Foods Inc. c.o.b. Poultons Valu-Mart (Respondent)

Unit: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Regional Municipality of Sudbury, save and except store managers and persons above the rank of store manager” (16 employees in unit) (*Having regard to the agreement of the parties*)

0024-89-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. 772685 Ontario Ltd. c.o.b. as Loeb Bayridge (Respondent) v. Group of Employees (Objectors)

Unit: “all meat department employees of the respondent in the Township of Kingston, save and except Department Manager, persons above the rank of Department Manager, employees regularly scheduled for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

0026-89-R: International Association of Machinists & Aerospace Workers (Applicant) v. Shadwood Enterprises Ltd. (Respondent)

Unit: “all employees of the respondent in North Bay, save and except supervisors, persons above the rank of supervisor, office and sales staff” (40 employees in unit)

0031-89-R: Christian Labour Association of Canada (Applicant) v. Gateway Residence of Niagara Inc. (Respondent) Unit: “all employees of the respondent in the City of Welland, save and except program director and persons above the rank of program director” (6 employees in unit) (*Having regard to the agreement of the parties*)

0042-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. U.T.D.C. Inc. (Respondent)

Unit: “all employees of the respondent at Kingston, Ontario, at its Princess Street location, save and except foremen, persons above the rank of foreman, manufacturing engineers, planners, manufacturing technologist, quality control inspectors, office, clerical and sales staff, security guards, students employed under cooperative education programs and students employed during the school vacation period” (62 employees in unit) (*Having regard to the agreement of the parties*)

0043-89-R: Service Employees Union, Local 183 (Applicant) v. Parkway House, Ottawa & District (Respondent)

Unit: “all employees of the respondent in the City of Ottawa, save and except administrator, persons above the rank of administrator, and confidential secretary to the administrator” (24 employees in unit) (*Having regard to the agreement of the parties*)

0053-89-R: Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 & 2309 (Applicant) v. R.N.R. Mechanical Contractors Inc. (Respondent)

Unit: “all millwrights and millwrights’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all millwrights and millwrights’ apprentices in the employ of the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0055-89-R: Christian Labour Association of Canada (Applicant) v. Wimbledon Park Investments Ltd. c.o.b. as Simcoe Terrace (Respondent)

Unit: "all employees of the respondent in the City of Barrie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors and persons above the rank of supervisor, office and clerical staff," (14 employees in unit) (*Having regard to the agreement of the parties*)

0074-89-R: United Food & Commercial Workers International Union (Applicant) v. Maple Leaf Mills Ltd. (Respondent)

Unit: "all employees of the respondent at its Prime Poultry Division in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (61 employees in unit) (*Having regard to the agreement of the parties*)

0080-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Nex Interiors Commercial Contractors Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0081-89-R: Ontario Public Service Employees Union (Applicant) v. Port Hope/Cobourg & District Association for Community Living (Respondent)

Unit: "all employees of the respondent in the County of Northumberland, save and except supervisors and persons above the rank of supervisor" (18 employees in unit) (*Having regard to the agreement of the parties*)

0093-89-R: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. R & B Carpentry & Glass Contractors (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former county of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0098-89-R: Teamsters Local No. 879 (Applicant) v. The Niagara Employment Agency Inc. (Respondent)

Unit: "all employees of the respondent in the City of St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

0126-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Manutec Steel Industries Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Ridgetown, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (36 employees in unit) (*Having regard to the agreement of the parties*)

0127-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. G. Macera Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-

Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0148-89-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Rowad Pipeline Company Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0151-89-R: United Food & Commercial Workers Union, Local 175, AFL:CIO:CLC (Applicant) v. Abbott Laboratories Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Brockville, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 17, 1989” (6 employees in unit) (*Having regard to the agreement of the parties*)

0153-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Rhucon (1988) Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (38 employees in unit)

0172-89-R: United Brotherhood of Carpenters’ & Joiners of America, Local 27 (Applicant) v. Supreme Carpentry Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0199-89-R: Hinterhoeller Yachts Ltd. Employees Association (Applicant) v. Hinterhoeller Yachts Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Niagara, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (101 employees in unit) (*Having regard to the agreement of the parties*)

0206-89-R: The Employees Association of St. Lawrence & District Ambulance Services (Applicant) v. 520212 Ontario Ltd. o/a St. Lawrence & District Ambulance Services (Respondent)

Unit: “all employees of the respondent in the Township of Osgoode regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor” (21 employees in unit) (*Having regard to the agreement of the parties*)

0209-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Bonaldi Carpentry Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0226-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Delso Restoration Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (22 employees in unit)

0238-89-R: Ontario Nurses’ Association (Applicant) v. Sisters of St. Joseph of the Diocese of Peterborough in Ontario (Respondent)

Unit #1: “all lay registered and graduate nurses employed in a nursing capacity by the respondent at Parry Sound, save and except Nursing Unit Managers, persons above the rank of Nursing Unit Manager, and persons regularly employed for not more than 24 hours per week” (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all lay registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the respondent at Parry Sound, save and except Nursing Unit Managers and persons above the rank of Nursing Unit Manager” (4 employees in unit) (*Having regard to the agreement of the parties*)

0245-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mississauga Concrete Forming Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0258-89-R: Canadian Union of Public Employees (Applicant) v. The Board of the Royal Botanical Gardens (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipalities of Hamilton-Wentworth and Halton, save and except supervisor, persons above the rank of supervisor, office and clerical staff and persons employed in bargaining units for which any trade union held bargaining rights as of April 25, 1989” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0259-89-R: Ontario Public Service Employees Union (Applicant) v. The Toronto Hospital Corporation (Respondent)

Unit: “all medical laboratory technologists, technicians and their assistants employed by the respondent in its Toronto Western Hospital Division, in its medical laboratories under the Council of Heads of Laboratory Departments in Metropolitan Toronto, save and except technologists-in-charge (coagulation), (hematology) and persons above the rank of technologist-in-charge, students-in-training and students employed during the school vacation period, office and clerical staff, practicing members of the medical and nursing professions and persons in bargaining units for which any trade union held bargaining rights as of April 26, 1989” (131 employees in unit) (*Having regard to the agreement of the parties*)

0260-89-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Ashly 333 Company Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0275-89-R: United Steelworkers of America (Applicant) v. I.M. Personnel Agency Inc. (Respondent)

Unit: “all employees of the respondent in the Township of Sombra, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

0292-89-R: Ontario Public Service Employees Union (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent)

Unit: “all medical laboratory technologists, medical laboratory technicians, and laboratory assistants employed by the respondent at its medical laboratories regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except charge technologists, persons above the rank of charge technologist, members of the Order of the Sisters of St. Joseph of Sault Ste. Marie, and employees in bargaining units for which any trade union held bargaining rights as of April 28, 1989” (24 employees in unit) (*Having regard to the agreement of the parties*)

0309-89-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The East Parry Sound Board of Education (Respondent)

Unit: “all occasional teachers employed by the respondent in its secondary panel in the region of East Parry Sound” (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0323-89-R: United Steelworkers of America (Applicant) v. Porcupine General Hospital (Respondent)

Unit #1: “all employees of the respondent in the City of Timmins, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, technical personnel (including in this exception, graduate and undergraduate: physio-, occupational, speech therapists, registered, non-registered and student: laboratory technicians, X-ray technicians, laboratory assistants) supervisors, persons above the rank of supervisor, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, information clerks, mail clerks, cashiers, and switchboard operators), persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (66 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the City of Timmins regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, technical personnel (including in this exception, graduate and undergraduate: physio-, occupational, speech therapists, registered, non-registered and student: laboratory technicians, X-ray technicians, laboratory assistants) supervisors, persons above

the rank of supervisor, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, information clerks, mail clerks, cashiers, and switchboard operators)” (8 employees in unit) (*Having regard to the agreement of the parties*)

0360-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rhucon 1988 Inc. (Respondent)

Unit: “all employees of the respondent in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0440-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bethlehem & Sons Excavating Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0442-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Manco, General Contractors (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1358-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. McIntosh Limousine Service Ltd. (Respondent)

Unit: “all dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor” (68 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	70
Number of persons who cast ballots	52
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	10

1362-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Airlift Limousine Services Ltd. (Respondent)

Unit: “all dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor” (68 employees in unit) (*Clarity Note*)

pality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor” (84 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	91
Number of persons who cast ballots	58
Number of ballots marked in favour of applicant	50
Number of ballots marked against applicant	8

1363-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Air Cab Limousine Services (1985) Ltd. (Respondent)

Unit: “all dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor” (83 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	91
Number of persons who cast ballots	57
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	3

1364-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Aarport Limousine Services Ltd. (Respondent)

Unit: “all dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor” (88 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	96
Number of persons who cast ballots	62
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	0

2421-88-R: Independent Canadian Transit Union (Applicant) v. The Smiths Falls Community Hospital Corporation (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: “all stationary engineers and those persons primarily engaged as their helpers employed in the power house at its South Unit, save and except chief engineer and those above the rank of chief engineer” (5 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ listF5	
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	4

2473-88-R: Ontario Public School Teachers’ Federation (Applicant) v. The Huron County Board of Education (Respondent)

Unit: “all occasional teachers and supply instructors employed by the respondent in its elementary school in the County of Huron, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act* (142 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	151
Number of persons who cast ballots	40
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	1

2775-88-R: Independent Canadian Transit Union (Applicant) v. Royal Ottawa Health Care Group (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all those employed by the respondent as Operating Engineers, the General Maintenance Foreman, Maintenance Men III, Operating Engineers on a part-time basis and Engineers Apprentices" (11 employees in unit)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	0

2957-88-R: Graphic Communications International Union, Local 500M (Applicant) v. Mediacom Inc. Backlight Graphics Division (Respondent) v. The Sign & Pictorial Painters, Local 1630 (Intervener)

Unit: "all employees of the respondent working in and out of the General Road plant in Mississauga, save and except employees acting in a supervisory or confidential capacity or having authority to hire, discharge or discipline employees, office and sales staff" (31 employees in unit)

Number of names of persons on list as originally prepared by employer	32
Number of persons who cast ballots	27
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	26
Number of ballots marked in favour of intervener	0

2990-88-R: Canadian Union of Public Employees (Applicant) v. Caressant Care Nursing Home of Canada Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit #1: "all employees of the respondent, operating under the style and cause of Caressant Care Nursing Home in the City of Lindsay, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, and those regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	3

Unit #2: "all employees of the respondent, operating under the style and cause of Caressant Care Nursing Home in the City of Lindsay, Ontario regularly employed for not more than 24 hours per week and students employed during the vacation period, save and except registered and graduate nurses, supervisors and persons above the rank of supervisor and office and clerical staff" (498 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	38
Number of ballots marked in favour of applicant	25
Number of ballots marked in favour of intervener	13

Unit #3: "all employees of the respondent, operating under the style and cause of Caressant Care Nursing Home in the City of Lindsay, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, and those regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	1

Unit #4: “all employees of the respondent, operating under the style and cause of Caressant Care Nursing Home in the City of Lindsay, Ontario regularly employed for not more than 24 hours per week and students employed during the vacation period, save and except registered and graduate nurses, supervisors and persons above the rank of supervisor and office and clerical staff” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	1

3127-88-R: Canadian Union of Public Employees (Applicant) v. Glengarry Association for Community Living (Respondent)

Unit: “all employees of the respondent in the County of Glengarry, save and except supervisors, persons above the rank of supervisor, and office staff” (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	46
Number of persons who cast ballots	37
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	34
Number of segregated ballots cast by persons whose names appear on voters’ list	2
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	9

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2906-88-R: Ontario Nurses’ Association (Applicant) v. Meaford General Hospital (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Meaford regularly employed for not more than 24 hours per week, save and except head nurses and persons above the rank of head nurse” (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	23
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

3208-88-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Minuk Contracting Inc. (Respondent) v. Group of Employees (Objectors) (11 employees in unit)

0003-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 599 (Applicant) v. 655492 Ontario Ltd. c.o.b. as McDonald Mechanical Plumbing & Heating (Respondent) (5 employees in unit)

0101-89-R: Ontario Public Service Employees Union (Applicant) v. Mission Services of London (Respondent) v. Group of Employees (Objectors) (63 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1392-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs,

Warehousemen & Helpers of America (Applicant) v. McDonnell-Ronald Limousine Service Ltd. o/a Airline Limousine Services Ltd. (Respondent)

Unit: "all dependent contractors of the respondent in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor" (339 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	344
Number of persons who cast ballots	205
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	142

2420-88-R: Independent Canadian Transit Union (Applicant) v. The Smiths Falls Community Hospital Corporation (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all stationary engineers and persons primarily engaged as their helpers employed in the power house save and except chief engineers and persons above the rank of chief engineer" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	4

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1962-88-R: Service Employees Union, Local 1983 (Applicant) v. Providence Manor, Home for the Aged, Sisters of Providence of St. Vincent de Paul (Respondent)

Unit: "all employees of the respondent in Kingston, save and except supervisors, persons above the rank of supervisor, Outreach Program Staff, and office and clerical staff" (248 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	197
Number of persons who cast ballots	181
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	177
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	65
Number of ballots marked against applicant	112

2798-88-R: United Paperworkers International Union (Applicant) v. Niagara Paper Co. Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	35
Number of persons who cast ballots	23
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	22
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	12

2547-88-R: Ontario Public Service Employees Union (Applicant) v. Participation Projects - Sudbury & District (Respondent) v. Group of Employee (Objector)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent at Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor and office and clerical staff"(19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	8

Unit #3: (see *Bargaining Agents Certified Without Vote*)

Applications for Certification Withdrawn

1106-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Toddglen Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener #1) v. Metropolitan Toronto Apartment Builders Association (Intervener #2)

1467-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bow West Interiors Ltd. (Respondent)

3058-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Resform Construction Ltd. (Respondent) v. The Formwork Council of Ontario (Intervener)

3110-88-R, 3111-88-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. P & M Electric (1982) Ltd. (Respondent) v. Group of Employees (Objectors)

3125-88-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Premier Cleaning Contractors of Canada Inc. (Respondent)

3167-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Dantam Structures (1986) Ltd. (Respondent) v. Formwork Council of Ontario (Intervener)

0052-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 663 (Applicant) v. Herter-Neill Construction Ltd. (Respondent)

0099-89-R: Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Loomis Armored Car Service Ltd. (Respondent)

0140-89-R: International Association of Machinists & Aerospace Workers (Applicant) v. Cusco Fabricators Ltd. (Respondent)

0175-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Associated Toronto Taxi-Cab Co-Operative Ltd. (Respondent)

0189-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. Sutherland Shultz Ltd. (Respondent) v. Ontario Sheet Metal Workers & Roofers Conference Sheet Metal Workers International Association, Local 562 (Intervener) v. International Brotherhood of Electrical Workers, Local 2345 (Intervener) v. International Union of Operating Engineers, Local 793 (Intervener) v. I.B.E.W. Construction Council of Ontario, International Brotherhood of Electrical Workers, Local 804 (Intervener) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Intervener)

0246-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Alfa Contracting, Division of Roadex Construction Inc. (Respondent)

0256-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Del-Tech Metal Products (Respondent)

0257-89-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. E. H. Ferree Company Ltd. (Respondent)

0268-89-R: Amalgamated Transit Union, Local 1573 (Applicant) v. The Corporation of the City of Brampton (Respondent)

0318-89-R: Windsor Printing Pressmen's Union, Local 274C (Applicant) v. The Print Shop (Respondent)

0324-89-R: United Steelworkers of America (Applicant) v. Carleton University (Respondent)

0441-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Venasse D. J. Construction Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0088-89-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Columbia Lumber Company Ltd. (Respondent) (*Withdrawn*)

0145-89-FC: International Union of Operating Engineers, Local 793 (Applicant) v. Donegan's Haulage Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2691-87-R: I.B.E.W., Local 804 of the I.B.E.W. Construction Council of Ontario (Applicant) v. Johnson Controls Ltd., J.M. Schneider Inc. (Respondents) (*Withdrawn*)

0607-88-R: International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Wallcraft Painting & Decorating Ltd. (Respondent) v. Brad Cobean (Objector) (*Dismissed*)

1930-88-R: Toronto Typographical Union, Local 91 (hereinafter referred to as the "Union") (Applicant) v. Southam Inc., Southam Printing Ltd. and Telemedia Publishing Inc., and Network Studios Inc. (Respondents) (*Withdrawn*)

2367-88-R: Labourers' International Union of North America, Local 607 (Applicant) v. Stebill Ltd., Hemmin Mine Service Ltd. (Respondents) (*Granted*)

2453-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Master's Construction Ltd., Bayly Commercial Construction Ltd., Docouto Investment Holdings Ltd., Maters Management & "D Verona" (Respondents) (*Withdrawn*)

2766-88-R: Millowrkers, Local #802 - United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tecumseh Lumber Square Inc. (Respondent) v. Windsor Drywall & Tool Supply (Intervener) (*Withdrawn*)

2954-88-R: Lumber & Sawmill Workers' Union, Local 2995, of the IWA-Canada (Applicant) v. Levesque Lumber (Hearst) Ltd. and Newaygo Forest Products Ltd. (Respondents) (*Withdrawn*)

3190-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Resform Construction Ltd. (Respondent) (*Withdrawn*)

0029-89-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. 557212 Ontario Inc. c.o.b. as National Mechanical and 810320 Ontario Inc. (Respondents) (*Granted*)

0180-89-R: The Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 172 (Restoration Steeplejacks) (Applicant) v. American Maintenance Company & Network Cleaning Systems Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2691-87-R: I.B.E.W., Local 804 of the I.B.E.W. Construction Council of Ontario (Applicant) v. Johnson Controls Ltd., J.M. Schneider Inc. (Respondents) (*Withdrawn*)

2867-87-R: Retail, Wholesale & Department Store Union, Local 414 (Applicant) v. New Dominion Stores, The Great Atlantic & Pacific Company of Canada Ltd. (Respondent) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Intervener) (*Dismissed*)

3363-87-R: 734385 Ontario Inc. and John Parker (Applicant) v. Service Employees Union, Local 183 (Respondent) (*Withdrawn*)

0607-88-R: International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Wallcraft Painting & Decorating Ltd. (Respondent) v. Brad Cobean (Objector) (*Dismissed*)

1930-88-R: Toronto Typographical Union, Local 91 (hereinafter referred to as the 'Union') (Applicant) v. Southam Inc., Southam Printing Ltd. and Telemedia Publishing Inc., and Network Studios Inc. (Respondents) (*Withdrawn*)

2367-88-R: Labourers' International Union of North America, Local 607 (Applicant) v. Stebill Ltd., Hemmin Mine Service Ltd. (Respondents) (*Granted*)

2453-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Master's Construction Ltd., Bayly Commercial Construction Ltd., Docouto Investment Holdings Ltd., Maters Management & 'D Verona' (Respondents) (*Withdrawn*)

2539-88-R: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Howard Avery Construction Ltd., Avery Construction Ltd., Howard Avery Contracting (Wawa) Ltd., Howard Avery Enterprises Inc., Avery Brothers Ltd., Avery & Onraet Ltd. (Respondents) (*Withdrawn*)

2765-88-R: Millworkers, Local #802 - United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tecumseh Lumber Square Inc. (Respondent) v. Windsor Drywall & Tool Supply (Intervener) (*Withdrawn*)

2898-88-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Shout Restaurant & Nite Club at the Skyline Hotel (Respondent) (*Withdrawn*)

2955-88-R: Lumber & Sawmill Workers' Union, Local 2995 of the IWA-Canada (Applicant) v. Levesque Lumber (Hearst) Ltd. and Newaygo Forest Products Ltd. (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2833-88-R: Canadian Union of Public Employees, Local 1582 (Applicant) v. Canadian Union of Public Employees, Locals 1806 & 2758 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2717-88-R: Christine Magnifico (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener)

Unit: "all employees of National Trust at 635 College Street, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

2721-88-R: Sue MacDonald (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener)

Unit #1: "all employees of National Trust at 2072 Danforth Avenue, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6

Unit #2: (6 employees in unit) (*Dismissed*)

2762-88-R: Charleen L. Ferguson (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener)

Unit: "all employees of National Trust at 3041 Kingston Road regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

2809-88-R: Sandra Raponi (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener)

Unit: "all employees of National Trust at 1547 Bayview Avenue, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions within the meaning of section 1(3)(b) of the Act, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

2810-88-R: Janeen G. Snare (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener)

Unit #1: "all employees of National Trust at 1410 Victoria Park Avenue, save and except branch managers, administration officer(s)/assistant branch manager(s) exercising managerial functions, administration officer trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employee in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

Unit #2: (8 employees in unit) (*Dismissed*)

2907-88-R: Lorraine Bolohan (Applicant) v. The National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W.), and its Local 240, successor to the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., and its Technical, Office & Professional (T.O.P.) Local 240, U.A.W. (Respondent) v. National Auto Radiator Mfg. Co. Ltd. (Intervener) (6 employees in unit) (*Granted*)

2970-88-R: Employees of Canadian Scale Co. Ltd. (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Worker's International Union (Respondent) v. Canadian Scale Company Ltd. (Intervener)

Unit: "all employees of the company employed in Etobicoke Township, Toronto, Ontario, save and except front office staff and foremen who have authority to hire and discharge employees, and those above the rank of foreman" (14 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	13

3019-88-R: Georgina Fleming (Applicant) v. London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondent) v. Strathroy Nursing Homes Ltd. (Intervener)

Unit: "all employees of Strathroy Nursing Homes Limited at Strathroy, Ontario, save and except supervisors, persons above the rank of supervisors, registered and graduate nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and office and clerical staff" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	4

3026-88-R: Employees of Relmech Mfg. Ltd. Re: Kevin Connolly (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1524 (Respondent) v. Group of Employees (Objectors) (51 employees in unit) (*Dismissed*)

3130-88-R: George Crankshaw (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 195 (Respondent) (*Withdrawn*)

0007-89-R: Fred Dawson (Applicant) v. United Steelworkers of America (Respondent) (20 employees in unit) (*Granted*)

0013-89-R: William S. McBay (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Can Car (1909) Inc. (Intervener) (26 employees in unit) (*Dismissed*)

0020-89-R: Regal Road Day Care Centre (Applicant) v. Canadian Union of Public Employees and its Local 2484 (Respondent) (*Withdrawn*)

0117-89-R: Mr. Reg Gurr for the employees of Skelhorn Bus Lines Ltd. (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (20 employees in unit) (*Dismissed*)

0193-89-R: Henia Krygier (Applicant) v. Retail, Wholesale & Department Store Union, and its Local 414, AFL:CIO:CLC (Respondent) (20 employees in unit) (*Dismissed*)

0319-89-R: Tammy Setrunka (Applicant) v. Local 75, Hotel Employees Restaurant Employees (Respondent) (4 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0320-89-U: Canada Building Materials Company, a Division of St. Mary's Cement Corporation (Applicant) v. Teamsters, Local Union 230, Stan Staples, et al (Respondents) (*Withdrawn*)

0429-89-U: Johnson Controls Ltd. (Applicant) v. Russell St. Eloi, Sean O'Ryan, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada and its Locals 628, 508, 800, 552, 663, 593, 527, 666, 67, 599, 46, 221, 463, 71 and 819 (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0419-89-U: Guild Electric Ltd. (Applicant) v. International Union of Operating Engineers, Local 793, John Monti, Joseph Kennedy, Mr. Montagnese, Mr. Ricciuto (Respondents) v. IBEW Construction Council of Ontario (Intervener) (*Dismissed*)

0430-89-U: Johnson Controls Ltd. (Applicant) v. Russell St. Eloi, Sean O'Ryan, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2279-86-U: Peter Rocca (Complainant) v. Ontario Catholic Occasional Teachers' Association (Respondent) v. Metropolitan Separate School Board (Intervener) (*Dismissed*)

2505-87-U: Sheet Metal Workers' International Association, Local 30 (Complainant) v. Rainscreen Metal Systems Inc. (Respondent) (*Granted*)

0010-88-U, 0609-88-U; 0696-88-U: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Complainant) v. Royce Dupont Poultry Packers (Respondent) (*Granted*)

0577-88-U: Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boiler-makers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 576 (Complainant) v. Hamilton Automatic Vending Company Ltd. (Respondent) (*Granted*)

0997-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 1000 (Complainant) v. Simpsons Ltd. (Respondent) (*Granted*)

1108-88-U: Sheet Metal Workers' International Association, Local 47 (Complainant) v. Conrad Heating Co. & Joe Conrad (Respondents) (*Granted*)

1689-88-U: Luis Lopez (Complainant) v. Canadian Union of Public Employees (Respondent) (*Dismissed*)

1725-88-U: Service Employees Union, Local 210 (Complainant) v. The Salvation Army Grace Hospital (Respondent) (*Withdrawn*)

2118-88-U: University of Guelph Staff Association (Complainant) v. University of Guelph (Respondent) (*Withdrawn*)

2215-88-U: Nurdin Kalla (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

2613-88-U: George Glaze (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Dismissed*)

2614-88-U: James S. Karpel (Complainant) v. Panex Show Service (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Dismissed*)

2615-88-U: Allan J. Baker (Complainant) v. Panex Show Service (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Dismissed*)

2616-88-U: Jim Prince (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Dismissed*)

2617-88-U: Jim Prince (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Dismissed*)

2644-88-U: United Food & Commercial Workers International Union, Local 206 (Complainant) v. Knob Hill Farms Ltd. (Respondent) (*Dismissed*)

2694-88-U: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Complainant) v. Free-formfive International Inc. (Respondent) (*Withdrawn*)

2696-88-U: United Steelworkers of America (Complainant) v. D.M. New Prime Windows Ltd. (Respondent) (*Withdrawn*)

2697-88-U: Shirley Ann Boydell (Complainant) v. United Steelworkers of America, Local 4153 and Amcan Castings Ltd. (Respondents) (*Dismissed*)

2707-88-U: Labourers' International Union of North America, Local 1059 (Complainant) v. London Salvage & Trading Company Ltd. (Respondent) (*Withdrawn*)

2754-88-U: Graphic Communications International Union, Local 500M (Complainant) v. Paragon Industrial Photographic Reproductions Ltd. (Respondent) (*Withdrawn*)

2807-88-U: Service Employees, Local 210, Affiliated with Service Employees' International Union, AFL:CIO:CLC (Complainant) v. Peace Bridge Customs Brokers (Respondent) (*Withdrawn*)

2808-88-U: Danny Lima (Complainant) v. Tom Lundrigun & Walter Cabral (Respondents) (*Withdrawn*)

2816-88-U: Chedoke-McMaster Hospitals - Chedoke Hospital Division (Complainant) v. Canadian Union of Public Employees, Local 839 (Respondent) (*Withdrawn*)

2817-88-U: Ontario Catholic Occasional Teachers' Association (Complainant) v. London & Middlesex County Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

2855-88-U: David Andrew Gray (Complainant) v. Engineering Constructors' Association (Respondent) (*Withdrawn*)

2896-88-U: John Kozak (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) (*Dismissed*)

2934-88-U: International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. 446285 Ontario Ltd. c.o.b. Beresford Tavern (Respondent) (*Dismissed*)

2935-88-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. General Coach (Respondent) (*Withdrawn*)

2960-88-U: Gary Steven Roach (Complainant) v. Rod McPhearson of Labourers Union, Local 1267 and Laid-law Waste (Pickering) (Respondents) (*Withdrawn*)

2985-88-U: IWA - Canada (Complainant) v. Allin Cable Reels (1984) Ltd. (Respondent) (*Withdrawn*)

3027-88-U: Fay Gyenge (Complainant) v. CUPE 1939 (Respondent) (*Withdrawn*)

3029-88-U: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Complainant) v. General Wood Products Ltd. (Respondent) (*Withdrawn*)

3081-88-U: Etta Gayle (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 and Primrose Hotel (Respondents) (*Dismissed*)

3089-88-U: Alice Paris (Complainant) v. R.W.S.U. (Respondent) (*Withdrawn*)

3096-88-U: Ontario Public Service Employees Union (Complainant) v. Mission Services of London (Respondent) (*Dismissed*)

3101-88-U: C.U.P.E. and Tracy Masterson (Complainant) v. Glengarry Association for Community Living (Respondent) (*Withdrawn*)

3137-88-U: Donald Coutu (Complainant) v. Retail, Wholesale & Department Store Union (Respondent) (*Withdrawn*)

3142-88-U: Ontario Public Service Employees Union (Complainant) v. Participation Projects - Sudbury & District (Respondent) (*Withdrawn*)

3149-88-U: International Brotherhood of Painters & Allied Trades, Local 557 (Complainant) v. Santiag's Old Country Painting & Decorating (Respondent) (*Withdrawn*)

3172-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. U-NEED-A CAB, Ali & Kassem Seede (Respondent) (*Withdrawn*)

3186-88-U: International Association of Machinists & Aerospace Workers (Complainant) v. Dominion General Manufacturing Ltd. (Respondent) (*Withdrawn*)

3188-88-U: Ontario Secondary School Teachers' Federation (Complainant) v. Perth County Board of Education (Respondent) (*Withdrawn*)

3192-88-U: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Humpty Dumpty Foods Ltd. (Respondent) (*Withdrawn*)

3211-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. Metropolitan Toronto Condominium Corporation No. 734 (Respondent) (*Withdrawn*)

3218-88-U: International Association of Machinists & Aerospace Workers District Lodge 717, Aeronautical

Lodge 717 Turbo (Complainant) v. Hawker Siddeley Canada Inc. (Orenda) Division (Respondent) (*Withdrawn*)

3222-88-U: London & District Service Workers' Union, Local 220 (Complainant) v. St. Joseph's Hospital (Respondent) (*Withdrawn*)

53224-88-U: Craig Foster (Complainant) v. International Brotherhood of Electrical Workers, Local 894 (Respondent) (*Withdrawn*)

0006-89-U: John Bremner (Complainant) v. C.A.W., Local 1256 (Respondent) (*Withdrawn*)

0008-89-U: Service Employees' Union, Local 183 (Complainant) v. Providence Manor, Home for the Aged Sisters of Providence of St. Vincent de Paul (Respondents) (*Withdrawn*)

0025-89-U: The Waterloo Civic Employees Union, Local 1542, Canadian Union of Public Employees (Complainant) v. The Corporation of the City of Waterloo (Respondent) (*Withdrawn*)

0035-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. U-Tec Welding & Fabricating Ltd. (Respondent) (*Withdrawn*)

0050-89-U: Teamsters Local No. 938 (Complainant) v. Air Cab Limousine Services (1985) Ltd., McIntosh Limousine Service Ltd., Aarport Limousine Service Ltd., Mr. Y. Zahavy and Dianne Thomson (Respondents) (*Withdrawn*)

0056-89-U: Dave Martin (Complainant) v. Board of Governors Providence Manor, Home for the Aged Sisters of Providence (Respondent) (*Withdrawn*)

0057-89-U: Rudy McPherson (Complainant) v. Board of Governors (Respondent) (*Withdrawn*)

0058-89-U: Robert James Micaly (Complainant) v. Board of Governors (Respondent) (*Withdrawn*)

0059-89-U: Robert James Micaly (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)

0079-89-U: Service Employees Union, Local 204, affiliated with the S.E.I.U., AFL:CIO:CLC (Complainant) v. Mr. Grumpp's Restaurant & Emporium (Respondent) (*Withdrawn*)

0105-89-U: United Brotherhood of Carpenters & Joiners of America, Local 1030 (Complainant) v. Adams & Kennedy Company Ltd., Rick Adams & Arthur Adams (Respondents) (*Withdrawn*)

0114-89-U: United Food & Commercial Workers International Union, Local 206 (Complainant) v. Knob Hill Farms Ltd. (Respondent) (*Dismissed*)

0119-89-U: Barbara Calder (Complainant) v. St. Joseph's Villa (Respondent) (*Withdrawn*)

0121-89-U: Canadian Paperworkers Union (Complainant) v. Hemiwood Ltd. (Respondent) (*Withdrawn*)

0131-89-U: Office & Professional Employees International Union, Local 343 (Complainant) v. Worker Education Centre (Respondent) (*Withdrawn*)

0164-89-U; 0165-89-U: Jane R. Marks (Complainant) v. Ontario Nurses Association (Respondent) (*Withdrawn*)

0166-89-U: Jane R. Marks (Complainant) v. Ontario Nurses' Association Staff Union and Relia Care Inc. (Respondents) (*Withdrawn*)

0167-89-U: Co-Fo Concrete Forming Construction Ltd. (Complainant) v. Labourers' International Union of North America, Local 1059 and Mr. Jim MacKinnon (Respondents) (*Withdrawn*)

0168-89-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Withdrawn*)

0195-89-U: Canadian Union of Public Employees and its Local 2935 (Complainant) v. Meno Bimahdizewin Child & Family Services (Respondent) (*Withdrawn*)

0198-89-U: Michael Peter Fantasia (Complainant) v. C.A.W., Local 29 (Respondent) (*Withdrawn*)

0220-89-U: Timothy Tredwell (Complainant) v. Canadian Autoworkers Union (Respondent) (*Withdrawn*)

0242-89-U: The Health, Office & Professional Employees Division of Local 175, United Food & Commercial Workers International Union, CLC, AFL - CIO (Complainant) v. Northumberland & Newcastle Board of Education (Respondent) (*Withdrawn*)

0272-89-U: William Dolan (Complainant) v. Picker International (Respondent) (*Withdrawn*)

0277-89-U: Michael Lindsay Brown (Complainant) v. Ontario Hydro and Bruno Ciccotelli Interim Area Manager Representing Ontario Hydro (Respondents) (*Withdrawn*)

0285-89-U: Ontario Public Service Employees Union (Complainant) v. Lakehead Regional Family Centre (Respondent) (*Withdrawn*)

0297-89-U: Robert Hartman (Complainant) v. United Steelworkers of America and Local 3292 (hereinafter called "the Union") (Respondent) (*Withdrawn*)

0325-89-U: United Steelworkers of America (Complainant) v. Goody's Fine Food Inc. (Steak & Burger Division) (Respondent) (*Withdrawn*)

0348-89-U: Ontario Public Service Employees Union (Complainant) v. Sudbury Board of Education (Respondent) (*Withdrawn*)

0375-89-U: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Complainant) v. Admiral Laundry Supply (Respondent) (*Withdrawn*)

0404-89-U: Barbara Joan Jackson (Complainant) v. Ontario Ministry of Health, Crown in Right of Ontario (Respondents) (*Dismissed*)

0413-89-U: Canadian Guards Association, Local 105 (Complainant) v. Canadian Guards Association, National Office (Respondent) (*Dismissed*)

0463-89-U: Naseem Mian (Complainant) v. C.A.W. Canada (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2379-88-M: Miss June Walker (Applicant) v. Service Employees International Union, Local 204 (Respondent Trade Union) v. Visiting Homemakers Association (Respondent Employer) (*Granted*)

0214-89-M: Nancy P. Parker (Applicant) v. Service Employees' Union, Local 210 (Respondent Trade Union) v. The Corporation of the County of Kent [Thamesview Lodge] (Respondent Employer) (*Dismissed*)

0215-89-M: Daniel G. Parker (Applicant) v. Service Employees' Union, Local 210 (Respondent Trade Union) v. The Corporation of the County of Kent [Thamesview Lodge] (Respondent Employer) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0046-89-M: The Textile Rental Institute of Ontario by & on behalf of Booth Avenue Hospital Laundry Inc., Centennial Hospital Linen Services & London Hospital Linen Services (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0091-89-M: Unifirst Canada Ltd. (Timberlea Blvd.) (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0092-89-M: Unifirst Canada Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0300-89-M: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Board of Education for the City of Toronto (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

2747-84-JD: International Association of Machinists & Aerospace Workers, Lodge 771 (Complainant) v. Boise Cascade Canada Ltd., and International Brotherhood of Electrical Workers, Local 1744 (Respondents) (*Dismissed*)

2308-88-JD: The Board of Governors of Exhibition Place (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 and Labourers' International Union of North America, Local 183 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3054-86-M: Canadian Union of Public Employees, Local 68 (Applicant) v. The Corporation of the City of Kitchener (Respondent) (*Withdrawn*)

1822-88-M: Ontario Nurses' Association (Applicant) v. Parkwood Hospital (Respondent) (*Granted*)

2894-88-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Niagara Falls Hydro-Electric Commission (Respondent) (*Withdrawn*)

3061-88-M: The Civic Institute of the Professional Personnel of Ottawa-Carleton (Applicant) v. The Corporation of the City of Ottawa (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0757-87-OH: Gerald Peter Moos (Complainant) v. The Canadian Salt Company Ltd. (Respondent) (*Withdrawn*)

1960-88-OH: H. Rigakos, Chiara Luzi, Elena Damiani, Kim Baker et al (Complainants) v. Sola Canada, A Unit of General Signal Ltd. (Respondent) (*Withdrawn*)

2412-88-OH: Linda Dickson (Complainant) v. Jay-Vee Canada Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

3486-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. Calorific Construction Ltd. (Respondent) (*Withdrawn*)

0335-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. D.M. Architectural Contracting Ltd. (Respondent) (*Granted*)

0912-88-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Richardson Brothers Insulation Company Ltd. (Respondent) (*Withdrawn*)

1162-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Canadian Cutting & Coring Ltd. (Respondent) (*Withdrawn*)

1517-88-G: Local 200 of the Ontario Council of the International Brotherhood of Painters & Allied Trades (Applicant) v. C. H. Heist Ltd. (Respondent) (*Withdrawn*)

1981-88-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Royal Tile & Terrazzo (Respondent) (*Granted*)

1999-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Olympia Contractors Ltd. (Respondent) (*Withdrawn*)

2176-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Pyramid Drywall & Acoustics Ltd. (Respondent) (*Granted*)

2584-88-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Marble, Tile, Terrazzo & Helpers, Local 31 (Applicants) v. Amber Tile & Terrazzo Inc. (Respondent) (*Granted*)

2744-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Nation Drywall (Respondent) (*Withdrawn*)

2994-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Rudy Structural Steel Inc. (Respondent) (*Granted*)

3039-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Nortenha Construction Co. (Respondent) (*Withdrawn*)

3133-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving & Contracting Ltd. (Respondent) (*Withdrawn*)

3136-88-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Rome Construction Ltd. (Respondent) (*Granted*)

3161-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Trident Construction Alberta (1986) Ltd. (Respondent) (*Withdrawn*)

3193-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Brunswick Drywall (Ontario) Ltd. (Respondent) (*Withdrawn*)

3194-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Pyramid Drywall Ltd. (Respondent) (*Withdrawn*)

3217-88-G: Ontario Allied Trades Council (Applicant) v. Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

0021-89-G; 0022-89-G; 0023-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Road Earthmoving Inc. (Respondent) (*Granted*)

0048-89-G: Ontario Provincial Conference of the International Union of Bricklayers' & Allied Craftsmen

(Applicant) v. Brun Tile Ltd. c.o.b. Royale Tile & Terrazzo and 509065 Ontario Ltd. c.o.b. as Capital Masonry (Respondents) (*Granted*)

0049-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Withdrawn*)

0075-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Comstock International Ltd. (Respondent) (*Withdrawn*)

0085-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Poce Construction Ltd. (Respondent) (*Withdrawn*)

0103-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. City Interior Company (Respondent) (*Withdrawn*)

0106-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mississauga Construction 786713 Ontario Ltd. (Respondent) (*Withdrawn*)

0108-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Anzano Construction (Respondent) (*Withdrawn*)

0124-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. D.J. Diamond Refrigeration Contracting Ltd. (Respondent) (*Granted*)

0130-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

0141-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Rapid Forming Inc. (Respondent) (*Withdrawn*)

0142-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Milne & Nicholls Ltd. (Respondent) (*Withdrawn*)

0144-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ainsworth Electric Co. Ltd. (Respondent) (*Withdrawn*)

0154-89-G: The Brotherhood of Painters, Decorators & Paperhangers of America (Applicant) v. The Board of Education for the City of Windsor (Respondent) (*Withdrawn*)

0157-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Terence A. Jamieson (Respondent) (*Granted*)

0181-89-G: The Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 172 (Restoration Steeplejacks) (Applicant) v. American Maintenance Company (Respondents) (*Granted*)

0182-89-G: The Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 172 (Restoration Steeplejacks) (Applicant) v. Network Cleaning Systems Inc. (Respondent) (*Granted*)

0194-89-G: Labourers' International Union of North America, Local 607 (Applicant) v. Gasparotto/Panontin Construction Ltd. (Respondent) (*Withdrawn*)

0222-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Malvern Drywall Systems Ltd. (Respondent) (*Withdrawn*)

0223-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. National Drywall Ltd. (Respondent) (*Withdrawn*)

0232-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. 757900 Ontario Inc. c.o.b. U-Flooric Contracting (Respondent) (*Granted*)

0252-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Campbell & Kennedy Electric Ltd. (Respondent) (*Withdrawn*)

0279-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Withdrawn*)

0280-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Traugott Construction (Kitchener) Ltd. (Respondent) (*Granted*)

0283-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Base Form Construction Ltd. (Respondent) (*Withdrawn*)

0284-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. W. A. Stephenson Construction (Respondent) (*Withdrawn*)

0288-89-G: International Union of Bricklayers & Allied Craftsmen, Local 12 & the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Aldershot Flooring Ltd. (Respondent) (*Withdrawn*)

0328-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nap-Mon Construction Ltd. (Respondent) (*Withdrawn*)

0358-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Provincial Cutting & Coring Ltd. (Respondent) (*Granted*)

0386-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. P.J. Daly Ltd. (Respondent) (*Withdrawn*)

0412-89-G: Labourers' International Union of North America, Local 607 (Applicant) v. 686807 Ontario Inc. o/a Cencan Group (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0749-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Widcor Ltd. and Green-King Ltd. (Respondents) (*Dismissed*)

0929-88-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Complainant) v. Labourers' International Union of North America, Local 1089 and Foster Wheeler Ltd. (Respondents) (*Dismissed*)

1734-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Hurdman Bros. Ltd. (Respondent) (*Dismissed*)

1908-88-U: Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 576 (Complainants) v. Hamilton Automatic Vending Company Ltd. (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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